(25,242)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 449.

LOUIS H. DENEE, PLAINTIFF IN ERROR,

vs.

W. M. RIDPATH.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 27, 1917.

a Filed in Supreme Court of Washington Aug. 16, 1915. C. S. Reinhart, Clerk.

In the Superior Court of the State of Washington within and for Spokane County.

No. 12258.

W. M. RIDPATH, Plaintiff,

vs.

LOUIS H. DENEE, Defendant.

Præcipe.

To the Hon. C. S. Reinhart, Clerk of the Supreme Court of the State of Washington:

You will please forward to the Supreme Court of the United States, under the writ of error allowed and issued in the above entitled action, the following parts of the record, to-wit:

Complaint.
Answer.
Motion to strike defendant's affirmative defense.
Order striking defendant's affirmative defense.
Defendant's offer of proof on trial.
Instruction by the Court.
Judgment.
Opinion of the Supreme Court of the State of Washington.
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Judgment of the Supreme Court.
Petition for writ of error, assignment, and prayer.
Bond.
Writ of error.
Certificate of lodgment.
Citation.
Return to writ.
Clerk's certificate.

Very respectfully yours,

SKUSE & MORRILL,
Attorneys for Defendant.

1 Original.

In the Superior Court of the State of Washington within and for Spokane County.

No. 44472.

W. M. RIDPATH, Plaintiff,

vs.

LOUIS H. DENEE, Defendant.

Complaint.

The plaintiff complaining of the defendant, for his cause of action alleges:

1. That he is and at all the times in this complaint mentioned, was a citizen and resident of Spokane County, Washington.

2. That at all the times in this complaint mentioned, plaintiff was in the peaceable and undisturbed possession of the real property hereinafter described and had been in such possession for more than five days next immediately preceding the entry of defendant thereon as hereinafter described; said real property being situated in Spokane County, Washington, and more particularly described as follows:

That part of the bed of Saltese Lake Lying below the meander line of said lake fixed and located by the United States government survey thereof and adjoining Lots One (1) and Two (2) of Section Twenty (20), and Lots Two (2), Three (3) and Four (4) of Section twenty-nine (29), Township Twenty-five (25) North, Range Forty-five (45), E. W. M., and bounded and more particularly described as that tract of land lying north of the south line of the northeast quarter of the northwest quarter of section twenty-nine, projected eastward, and lying West of the West line of the Southeast quar-
2 ter of the southeast quarter of section twenty projected southward to a point of intersection in the bed of said Saltese Lake with said first extended line, and bounded by said meander line from a point where said west line of the southeast quarter of the southeast quarter of section twenty extended southward intersects said meander line of said Saltese Lake, thence along said meander line, along said lots one and two of section twenty and lots two (2), three (3) and four (4) of section twenty-nine (29) to a point where the south line of the northeast quarter of the northwest quarter of section twenty-nine (29) intersects said meander line, embracing therein seventy-five (75) acres, more or less, the same having been reclaimed and now being dry land.

3. That during all the times herein mentioned said premises were enclosed by a good and substantial fence which had heretofore been and then was maintained by this plaintiff.

4. That on or about the 9th day of March, 1914, when this plaintiff was absent therefrom and to-wit about the hours of eleven o'clock

to four o'clock next following in the night time, following said 9th day of March, 1914, the defendant broke the enclosure above mentioned around said above described premises and entered thereon and has since said entry, continuously occupied and remained upon said premises.

5. That on the 27th day of March, 1914, plaintiff in writing notified said defendant to vacate and remove from said premises and then and there demanded that he surrender the same to him; but, notwithstanding said notice and demand, said defendant has for more than three days, to-wit, from said 27th day of March, 1914, the date of said notice and demand, refused and does still refuse to remove therefrom or surrender the same to this plaintiff.

3 6. That the possession of said described lands is of great value to this plaintiff and the keeping of this plaintiff out of such possession, will cause him great damage and loss in the sum of $1,175.00.

Wherefore plaintiff prays judgment; for the restitution of said premises, to him, and that a writ of restitution issue herein, for his damages for the forcible detainer of said premises by the defendant and that said damages be trebled and that plaintiff have other and further relief, besides costs of suit.

TURNER & GERAGHTY AND
D. W. HENLEY,
Attorneys for Plaintiff.

STATE OF WASHINGTON,
County of Spokane, ss:

W. M. Ridpath being first duly sworn, on his oath deposes and says he is the plaintiff in the above and foregoing entitled cause of action; that he has read his complaint herein, and knows the contents thereof and the allegations therein contained are true in substance and in fact as he verily believes.

W. M. RIDPATH.

Subscribed and sworn to before me this 31st day of March, 1914.

C. B. DUNNING,
Notary Public for Washington, Residing at Spokane.

Filed Mar. 31, 1914 at 1:35 o'clock P. M. Glenn B. Derbyshire, Clerk. E. E. Burton, Deputy.

4 In the Superior Court of the State of Washington in and for the County of Spokane.

No. 44472.

W. M. RIDPATH, Plaintiff,

vs.

LOUIS H. DENEE, Defendant.

Answer.

Now comes the above named defendant, and for answer to the complaint of the plaintiff denies and alleges as follows:

I.

Defendant admits paragraph 1 of plaintiff's complaint.

II.

Answering paragraph 2 of plaintiff's complaint, this defendant admits that the land and premises therein described is dry land and contains seventy-five (75) acres more or less, as alleged in said paragraph 2, and denies each and every other allegation, matter and thing therein contained, and all thereof.

III.

Denies paragraph 3 of plaintiff's complaint.

IV.

Answering paragraph 4 of plaintiff's complaint, defendant admits that he is occupying the premises described and denies each and every other allegation, matter and thing therein contained, and all thereof.

V.

Answering paragraph 5 of plaintiff's complaint, defendant admits that on or about the 27th day of March, 1914, plaintiff notified defendant in writing to remove from said premises, and also admits that defendant has failed and refused to remove therefrom, and denies each and every other allegation, matter and thing
5 set forth in said paragraph 5.

VI.

Answering paragraph 6 of plaintiff's complaint, this defendant denies each and every allegation, matter and thing therein contained.

For a further and affirmative defense to the complaint of the plaintiff, defendant alleges:

I.

That the lands and premises set forth and described in the complaint of the plaintiff, are and during all of the times herein mentioned were, unsurveyed and unappropriated public lands of the United States and a part of the public domain, subject to settlement under the homestead laws of the United States, and on the 30th day of October, 1909, and long prior to the time that plaintiff claimed or pretended to have any possession thereof, this defendant, in good faith as a homestead settler and for the purpose of thereafter making a homestead entry thereon, and acquiring title thereto from the government of the United States under the Homestead Laws, made settlement upon the lands described in plaintiff's complaint, and all thereof, and has never since abandoned his settlement thereon, and is still occupying said lands, and all thereof, as a homestead settler thereon, in good faith under the homestead settlement laws of the United States. That at the time defendant settled upon said lands, as aforesaid, there was no one residing thereon, or on any part or portion thereof, and no other person had prior thereto settled upon said lands, or any part thereof, claiming same as a settler under the Homestead Laws of the United States, or under any law of the United States, and there was not at the time this defendant setttled upon said lands, as aforesaid, any improvements thereon, or upon any part or portion thereof, made by any person claiming said lands as a settler under the homestead laws of the United States, or under any law of the United States, and this defendant was at the time of such settlement, and ever since has been, and still is, the only person occupying such lands, or any portion thereof, under the homestead laws of the United States, or under any law of the United States. That at the time of the making of such settlement, this defendant was over the age of twenty-one years, a native born citizen of the United States, and not the proprietor of 160 acres of land in any state or territory of the United States, and had never, prior thereto, made any entry of public lands under the homestead laws of the United States, and then was, and now is, in every way qualified to make settlement upon and entry upon public lands, and acquire title thereto from the United States, under the homestead laws of the United States. That in making his said settlement upon said lands, as aforesaid, this defendant, on the 30th day of October, 1909, erected upon said tract of land a frame house 10 x 12 feet in size, with door, window and floor, suitable for habitation at any and all seasons of the year. That he then and there, on said date, furnished said house with all necessary cooking and household utensils, and entered into the possession and occupation of said house and established his residence therein, and is now residing thereon, and has never since said 30th day of October, 1909, abandoned his settlement and residence upon said land. That in making settlement upon and residing upon said lands, as aforesaid, this defendant did so in good faith with a bona fide intention to continue to reside

upon and occupy said lands and cultivate and improve the same, as required under the homestead laws of the United States, and this defendant settled upon and established his residence thereon with the full intention to occupy, improve and reside thereon, and com-
7 ply with all the requirements of the homestead laws of the United States, and for no other purpose whatever. That in order to comply with the requirements of the homestead laws of the United States and acquire title to the lands so settled upon by defendant, as aforesaid, under said laws, it becomes, and is, necessary for this defendant to reside upon and cultivate such lands, and to have possession thereof for a period of five years, and unless this defendant can reside upon, cultivate and have possession of said lands for and during such period of time, this defendant cannot comply with the requirements of the homestead laws of the United States and sustain and maintain his rights to said lands and acquire title thereto from the government of the United States under the homestead laws of the United States.

II.

That at the time defendant made settlement and established his residence upon said lands, the plaintiff was not in possession thereof, or of any part thereof, and did not claim any right therein, or in possession thereof, and has never at any time had possession thereof, or any part thereof, or any right thereto, or to the possession thereof, and said plaintiff with the intent and purpose to wrongfully and unlawfully cultivate said land, so settled upon by defendant, as aforesaid, is now, wrongfully and unlawfully and without any right so to do, attempting to prevent defendant from maintaining his residence upon said lands and acquire title thereto under the homestead laws of the United States, and, in order to carry out the said wrongful and unlawful intent of plaintiff, said plaintiff has ordered and directed defendant to remove from said lands and to give up his possession thereof, and has threatened to remove the defendant therefrom, and to remove defendant's house therefrom, and has unlawfully threatened defendant with arrest and imprisonment, and in many other ways threatened and tried to intimidate the defendant from
8 continuing his settlement and residence upon said lands, and by so doing prevent this defendant from complying with the homestead laws in the matter of settlement, residence and cultivation upon said lands, and thereby to prevent this defendant from making the necessary legal proofs to the land department of his settlement, residence, cultivation and improvements of said land.

III.

That by virtue of the settlement and residence made upon said lands by defendant, and by virtue of the same being unsurveyed lands of the United States, this defendant is entitled to use, occupy and control the same and to the possession thereof, and to reside thereon and make same his home and place of residence, and plaintiff, by virtue of his threats and acts aforesaid is wrongfully and unlawfully

interfering with defendant and preventing defendant from exercising his rights under the homestead settlement laws of the United States. That plaintiff has never made settlement upon said lands, or upon any part thereof, and has never attempted to use, occupy or improve the same, or to claim any rights thereon under the homestead settlement laws of the United States, or under any law of the United States.

IV.

That the lands and premises described in the complaint of the plaintiff are a part of a contiguous body of lands containing 1,200 acres lying and being in Sections 4 and 5, Township 24, and a portion of Sections 20, 28, 29, 32 and 33 in Townships 25, North Range 45, E. W. M., which have never been surveyed by the government of the United States, and which *has* never been alienated or disposed of by the Government of the United States, and all of which ever
9 has been, and now is, unsurveyed government lands belonging to the government of the United States, as a part of its public domain, and subject to and open for settlement under the homestead laws of the United States.

V.

That the possession of said lands is of great value to the defendant and to be dispossessed thereof, will cause defendant great damage, loss and injury, to-wit: in the sum of Three Thousand Five Hundred ($3,500) Dollars.

Wherefore, defendant prays judgment:

First. That said action be dismissed:

Second. For damages against the plaintiff; and

Third. That defendant have and recover his costs and disbursements herein.

SKUSE & MORRILL,
Attorneys for Defendant.

STATE OF WASHINGTON,
County of Spokane, ss:

Louis H. Denee, being first duly sworn, on oath says:

That he is the defendant in the above entitled action: that he has read the foregoing Answer, knows the contents thereof, and the same is true as he verily believes.

LOUIS H. DENEE.

Subscribed and sworn to before me this 7th day of April, 1914.

FRED B. MORRILL,
Notary Public in and for the State of Washington, Residing at Spokane.

Service of the within answer and receipt of a true copy thereof is hereby acknowledged this 8th of April, 1914.

D. W. HENLEY,
Attorney for Plaintiff.

Filed Apr. 18, 1914 at 9:25 o'clock A. M. Glenn B. Derbyshire, Clerk. C. W. Steinmetz, Deputy.

10 In the Superior Court of the State of Washington in and for the County of Spokane.

W. M. RIDPATH, Plaintiff,

vs.

LOUIS H. DENEE, Defendant.

Motion to Strike.

Comes now the plaintiff herein and moves the court for an order striking defendant's "Further affirmative answer and defense", and each and every paragraph and part thereof, for the reason that the answers and defenses therein contained are sham, frivolous and irrelevant.

D. W. HENLEY,
TURNER & GERAGHTY,
Attorneys for Plaintiff.

Service of the within motion to Strike by a receipt of a true copy thereof admitted this 15th day of April, 1914.

SKUSE & MORRILL,
Attorneys for Defendant.

Filed Apr. 16, 1914 at 9 o'clock A. M. Glenn B. Derbyshire, —. C. W. Hopkins, Deputy.

11 In the Superior Court of the State of Washington in and for the County of Spokane.

No. 44472.

W. M. RIDPATH, Plaintiff,

vs.

LOUIS H. DENEE, Defendant.

On this 18th day of April, 1914, this cause came regularly on for hearing by the Court on motion to strike defendant's affirmative answer and defense, and after hearing said motion and the argument of

counsel and the Court being fully advised in the premises, it is by the Court—

Ordered, That said motion be, and the same is hereby sustained, for the reason that the allegations of the affirmative defense can be proven upon the denials in the answer. To which defendant excepts and exception allowed, same being an affirmative denial.

E. H. SULLIVAN, *Judge.*

Filed Apr. 14, 1914. Glenn B. Derbyshire, Clerk. Chas. Mengel, Deputy.

12 On the trial the defendant offered to prove as follows:

"Mr. Morrill: The defendant at this time offers to prove and show to the court and jury by testimony of Hal J. Cole, the register of the United States Land Office at Spokane, Washington, and by the official records of said land office, that the land and premises in question are a part of a contiguous body of land containing approximately 1,200 acres, which has never been surveyed by the Government of the United States, and which has never been alienated or disposed of by the Government of the United States, and is now and ever has been unsurveyed government land, belonging to the Government of the United States, as a part of its public domain, and subject to and open for settlement under the homestead laws of the United States.

Offer objected to as incompetent and immaterial. Objection sustained and exception taken and allowed.

"Mr. Morrill: Defendant also offers to prove and show to the court and jury by his own testimony that on the 30th day of October, 1909, he was over the age of 21 years, a native born citizen of the United States, and not the proprietor of 160 acres of land in any state or territory of the United States, and had never prior to said date made any entry on public land under the homestead laws of the United States, or settled thereon as a homestead settler under the homestead laws of the United States, and then was and is now in every way qualified to make setttlement upon and entry of, public lands of the United States, and acquire title thereto under the homestead laws of the United States; that on the 30th day of October, 1909, defendant in good faith as a homestead settler, and for the purpose of making homestead entry and acquiring title to said lands, in question, from the government of the United States under the homestead law, made

13 settlement upon the land in question and all thereof, and has never since abandoned said settlement thereon, and is still occupying said land and all thereof, as a homestead settler in good faith, under the homestead laws of the United States. That at the time defendant settled upon said land there was no one residing thereon, or upon any part or portion thereof, and no person had prior thereto settled upon said lands, or upon any part or portion thereof, claiming same under the homestead laws of the United States, or under any law of the United States, and there was not at the time defendant made said settlement upon said land, any improvement thereon or upon any part or portion thereof, made by any person

claiming said land as a settler under the homestead laws of the United States or under any law of the United States, and that this defendant was at the time of such settlement and ever since has been and still is the only person occupying the lands in question or any part or portion thereof, under the homestead laws of the United States or under any law of the United States. That in making said settlement upon said lands, defendant, upon the 30th day of October, 1909, erected thereon a frame lumber house, 10 x 12 feet in size, with doors, windows and floor, suitable for habitation at any and all seasons of the year; that he then and there upon said date, furnished said house with the necessary cooking and household utensils, and entered into the possession and occupation of said house, and established his residence therein, and is now residing upon said tract, and has never since said 30th day of October, 1909, voluntarily abandoned same. That in making settlement upon and in residing upon said land, defendant did so in good faith, with the bona fide intention of continuing to reside upon and occupy said land and to cultivate and improve the same as required by the homestead laws of the United States, and to comply with all of the requirements of the homestead laws of the United States, with the full intention and purpose of occupying and residing thereon, and complying with all requirements of the homestead laws of the United States, and
14 for no other purpose. That at the time defendant made his settlement and established his residence upon said land, upon the 30th day of October, 1909, plaintiff was not in possession thereof, or any part or portion thereof, and did not claim any right therein, or in the possession thereof. That said lands are, and were at the time defendant made his settlement and established his residence thereon, good agricultural land, susceptable of being farmed and cultivated as other agricultural lands, only valuable for agricultural purposes, and that the only use said lands can be put to, is for farming and raising of agricultural crops thereon.

Offer objected to as incompetent and immaterial—objection sustained—exception taken by defendant and allowed.

Mr. Morrill: Defendant also offers to prove and show to the court and the jury that the plaintiff has never at any time resided upon the lands in question or upon any part or portion thereof, and that the only occupation by the plaintiff of the land in question, has been for grazing, cropping and cutting of hay thereon, for his own profit, and that the plaintiff is not a qualified homestead settler under the homestead laws of the United States, being the proprietor of more than 160 acres of land in the State of Washington.

Offer objected to as incompetent and immaterial—objection sustained—exception taken by defendant, and allowed.

15 *Instructions by the Court.*

LADIES & GENTLEMEN OF THE JURY: This action is brought by the plaintiff, W. M. Ridpath, against the defendant Louis H. Denee, to recover the possession of the premises described in the complaint

and the sum of $1,175.00 as damages for detention of the premises in the complaint described by the defendant. The plaintiff in his complaint alleges that he is, and at all times in the complaint mentioned was, a citizen and resident of Spokane County, Washington, which is admitted by the defendant in his answer.

Plaintiff further alleges that at all the times in his complaint mentioned plaintiff was in the peaceable and undisturbed possession of the property described in the complaint, and had been in such possession for more than five days next immediately preceding the entry of the defendant thereon, as in the complaint set forth. That said real property is situated in Spokane County, Washington, and described as follows:

That part of the bed of Saltese Lake lying below the meander line of said lake, fixed and located by the United States government survey thereof, and adjoining Lots one and two of section twenty, and lots two, three and four of section twenty-nine, township twenty-five north, range forty-five, E. W. M. and bounded and more particularly described as that tract of land lying north of the south line of the N. E. quarter of the N. W. quarter of section twenty-nine, projected eastward, and lying west of the west line of the southeast quarter of the southeast quarter of section twenty projected southward, to a point of intersection in the bed of said Saltese Lake, with said first extended line, and bounded by said meander line from a point where said west line of the S. E. quarter of the S. E. Quarter of section twenty extended southward, intersects said meander line
16 of said Saltese Lake, thence along said meander line, along said lots one and two of section twenty, and lots two, three and four of section twenty-nine to a point where the south line of the north-east quarter of the northwest quarter of section twenty-nine intersects said meander line, embracing therein seventy-five acres, more or less, the same having been reclaimed, and now being dry land.

To these allegations the defendant answers and admits that the land and premises therein described is dry land, and contains seventy-five acres more or less, as alleged in the complaint, and denies each and every other allegation, matter and thing contained in said paragraph.

Plaintiff further alleges that during all the times mentioned, said premises were enclosed by a good and substantial fence, which had heretofore been, and then was maintained by this plaintiff.

This paragraph is denied by the defendant in his answer.

Plaintiff further alleges that on or about the 9th day of March, 1914, when this plaintiff was absent therefrom and to-wit at about the hour of 11 o'clock to 4 o'clock the next morning, in the nighttime, following the said 9th day of March, 1914, the defendant broke the enclosure around the said described premises, and entered thereon, and has since said entry, continuously occupied, and remained upon said premises.

To this paragraph the defendant answers and admits that he is occupying the premises described, and denies each and every other allegation, matter and thing in said paragraph contained.

Plaintiff further alleges that on the 27th day of March 1914, plain-

tiff in writing notified said defendant to vacate and remove from said premises, and then and there demanded that he surrender the
17 same, but notwithstanding said notice and demand, said defendant has for more than three days from the said 27th day of March, 1914, and does still refuse to remove therefrom, or surrender the same to this plaintiff.

The defendant in answer to this paragraph admits that on or about the 27th day of March, 1914, plaintiff notified the defendant to remove from said premises, and also admits that the defendant has failed and refused to remove therefrom, and denies each and every other allegation, matter and thing set forth in said paragraph.

Plaintiff further alleges that the possession of said described lands is of great value to this plaintiff, and the keeping of this plaintiff out of such possession has caused him great damage and loss, in the sum of $1,175.00.

All of which is denied by the defendant in his answer.

In addition to these denials and admissions, the defendant has set up in his answer, by way of affirmative defense, certain matters which have heretofore been stricken out by order of the court, and the jury will not consider the same.

Our statute provides that every person is guilty of forcible detainer "Who in the night-time or during the absence of the occupant of any real property unlawfully enters thereon, and who after demand made for the surrender thereof, refuses for the period of three days to surrender the same to such former occupant.

The occupant of real property within the meaning of this subdivision is one who, for five days next preceding such unlawful entry was in the peaceable and undisputed possession of such real property," and the court instructs you that this action is based on this statute.

You are instructed as a matter of law, that in this state one having the right of possession of lands is not permitted to enter upon
18 the possession of the same while they are in the actual and peaceful occupation of another against the will of the latter, and if he do so, the law will require him to restore the possession to such occupier.

The court instructs you the law requires a person who claims title or right to the possession of premises, in the actual peaceful possession of another, to resort to his legal remedies instead of taking the law into his own hands and gaining such possession by force or by invading the actual peaceful possession of another, and the statute of this state provides that where the land is in the peaceful and undisturbed possession of another for a period of five days prior to another entering thereon, and such other enters thereon in the absence of such prior occupant, or during the night time, or by force, and the person so entering refuses for the period of three days to surrender up the possession to the prior occupant and retains possession, such retention is an unlawful detainer and the prior possessor is entitled to recovery of possession.

The court instructs the jury that in this action the title to the property in question is not involved, and it is not material whether the

land is owned by the United States or open to homestead settlement or not. The ownership cannot be determined or considered by the jury.

The court instructs you that if you believe from the evidence that for the full period of five days prior and up to about the night of the ninth day of March, 1914, the plaintiff was in the peaceful and undisturbed possession of the premises in question, either by himself or his agent, and that while the plaintiff was so in possession the defendant intruded himself into such possession without the consent of the plaintiff in the absence of the plaintiff, or in the night by force, such intrusion would be unlawful and will render the defendant liable in this action, provided you further believe from the evidence that a written demand was made upon the defendant by the
19 plaintiff, for the possession of said premises and that the defendant retained the possession thereafter for the period of three days before the commencement of this suit, and that defendant refuses to surrender such possession. You are instructed that possession by a tenant under a lease is not possession by an agent.

The Court instructs you that whether the plaintiff was lawfully or unlawfully in the possession of the premises is a matter of no consequence in this suit and cannot be considered by the jury. The material questions for the jury to determine from the evidence are whether in fact, at the time in question, to-wit, the night between the ninth and tenth days of March, 1914 and for five days or more immediately prior thereto the plaintiff was in the peaceful and undisturbed possession of the premises in question, and whether the defendant entered upon such possession without the consent of the plaintiff during said night or in the absence of the plaintiff, or by force, and retains such possession for three days after demand made by the plaintiff upon the defendant to surrender such possession.

And if the jury finds that at said time the plaintiff was in the peaceful and undisturbed possession of the said premises, and that the defendant entered thereon in either of said ways and that the said demand was given by the plaintiff to the defendant and that the defendant still retains the possession, then the jury should find for the plaintiff.

I further instruct you that actual possession, as used in these instructions, is that possession of property which the occupant has who uses and controls the same to the exclusion of all other persons therein. It is not necessary that the plaintiff should have actually lived upon or been at all upon the particular tract of land in controversy in this case; but if you find from the evidence that plaintiff or his grantors had taken possession of said premises and had enclosed the same with a substantial fence, or had enclosed said land with other lands and had sown crops thereon, or had pastured his stock thereon, or had put the same to any use for himself of which
20 the land was capable, and was so occupying and using said land at the time of the entry of the defendant, then I instruct you that within the meaning of the law the plaintiff was in the actual possession of the premises claimed by him in this case, and if you find

that the defendant entered upon said possession, as in his complaint stated, the verdict will be for the plaintiff.

If you find from the evidence in this case that one James S. Grant, was occupying the premises mentioned in the complaint, under a written lease from plaintiff, at the time of the alleged entry of the defendant upon the premises, to-wit the 9th day of March, 1914, then you should find for the defendant in this case. However, if you should find from the evidence that the plaintiff leased by written lease to James S. Grant the premises mentioned in the complaint, and that prior to the time of the alleged entry of the defendant upon the premises, the plaintiff and said Grant had agreed to cancel said lease, and that the said plaintiff should have possession of said property, and that at the time of the said alleged entry, said plaintiff did have possession of said property under said agreement with the said Grant, for at least five days prior to the entry of said defendant upon said premises, then the court instructs that you should find for the plaintiff in this case, if you should find from the evidence that the defendant entered upon the premises described in the complaint, in the night-time or in the absence of plaintiff, and refusd to leave said premises after a written demand was made upon him to leave and surrender said premises as alleged in said complaint.

If you find for the plaintiff in this case it will then be your duty to assess the damages that the plaintiff is entitled to, and in so doing you should take into consideration the productiveness of the soil of the premises detained, the number of acres detained, the num-
21 ber of tons to the acre of timothy, hay, said land would produce, if any, and the net price per ton, for the crop year of 1914, and arriving at the amount of damages that the jury should take into consideration all the evidence in the case relating to such crop and award the plaintiff such damages as he would be justly entitled to under the evidence.

The burden rests upon the plaintiff to establish by the preponderance of the evidence that the defendant entered upon the premises described in the night-time as alleged in the complaint, or in the absence of the defendant therefrom, and at the time the defendant so entered upon said premises, the plaintiff was in the peaceful and undisturbed possession of said premises, and had been in such possession for more than five days next immediately preceding said entry thereof by the defendant, and at said time said plaintiff was entitled to the peaceable and undisturbed possession of said premises.

That the plaintiff notified the defendant to vacate and surrender said premises as alleged in the complaint and the said defendant for more than three days after said notice *and* refused to vacate or surrender the same.

By a preponderance of the evidence is meant the weight of evidence, that is its convincing force to the minds of the jurors.

The jury are instructed that you are the exclusive judges of the facts established by the testimony, and the credibility of the witnesses. Being the exclusive judges of the facts established by the testimony, it is your duty to disregard everything and anything the attorneys may have said during the trial of the case, as to what the testi-

mony is as to any fact or facts in the case, unless the same shall agree with your own judgment as to what the evidence is.

It is also your absolute duty to disregard any intimation the court may have made as to what the testimony is as to any fact or
22 facts, while ruling upon any questions of law raised by the attorneys. The court has nothing to do with the facts; that is the exclusive province of the jury and the court has not intended to intimate what it thought of any fact or facts in the case, or what the testimony is in regard to any fact or facts in the case, in ruling upon questions of law raised by the counsel, and if the jury are of the opinion that the court has done so, it is your duty to absolutely disregard the same, and rely solely upon your own judgment as to what the testimony is.

In judging as to the credibility of the story told by any witness you are at liberty to, and should take into consideration the appearance of the witness while upon the witness stand, his manner of testifying, his candor or lack of candor, his apparent knowledge or lack of knowledge of the things about which he testifies, the apparent truthfulness or untruthfulness of his story, his interest in the result of the action, if any, and any other facts or circumstances which have arisen from the witness stand during the trial, which would in your judgment affect the credibility of the story told by the witness; and you should give to the testimony of every witness, such weight and credit as, in your judgment and under all the circumstances, and the facts and evidence in the case, you deem it deserves.

If you find that any witness has knowingly and willfully testified falsely to any material fact in the case, you are at liberty to disregard the entire evidence of such witness, except in so far as you find the same to be corroborated by other creditable evidence.

You are at liberty to return one of two verdicts in this case. If you find for the plaintiff, your verdict will be for the plaintiff and the amount of damages, under the instructions of the court, which you have assessed; and if you find for the defendant, your verdict will be simply for the defendant in this case.

23 This being a civil case, ten of your number may agree upon a verdict.

When you retire to your jury room, you will elect a foreman, who will speak and act for you when called into court, and who will sign your verdict for you when you have arrived at same.

You will have with you in the jury room, the complaint of the plaintiff, the answer of the defendant thereto, on which this action is tried, together with the blank forms of verdict, whatever exhibits *has* been admitted in evidence in the case, and these instructions.

You will now listen to the argument of counsel.

24 In the Superior Court of the State of Washington within and for Spokane County.

No. 44472.

W. M. RIDPATH, Plaintiff,

vs.

LOUIS H. DENEE, Defendant.

Judgment.

Now, on this 22nd day of June 1914, this cause having heretofore and on the 8th day of June, 1914, been called for trial upon the pleadings before the court and a jury, the plaintiff appearing in person and by Turner & Geraghty and D. W. Henley, his attorneys, and the defendant appearing in person and by Skuse & Morrill, his attorneys, and the cause having been submitted upon the testimony of the witnesses for the respective parties, and the instructions of the court and the arguments of counsel, whereupon the jury retired to consider of their verdict, and after due consideration the jury returned into court with their verdict duly dated and signed by their foreman in words and figures following:

"Case No. 44472. Verdict for Plaintiff.

We, the jury in the case of W. M. Ridpath, plaintiff, vs. Louis H. Denee, defendant, find for the plaintiff and assess his damages at the sum of One Hundred ($100) Dollars.

Spokane, Washington, June 10th, 1914.

J. E. WALLACE, *Foreman.*"

Now, therefore, it is by the court ordered and adjudged that the plaintiff do have and recover of and from the defendant the sum of two hundred dollars, being twice the damages assessed by the jury, and that he have his costs in the sum of eighty-two and 20/100 dollars and that execution issue therefor.

25 And it is further ordered and adjudged that a writ of restitution issue to the sheriff of Spokane County directing and commanding him to restore the plaintiff to the full and peaceable possession of the said premises in controversy in this action and more particularly described as follows:

That part of the bed of Saltese Lake lying below the meander line of said lake fixed and located by the United States Government survey thereof and adjoining Lots One (1) and Two (2) of Section Twenty (20) and Lots Two (2) Three (3) and four (4) of Section Twenty-nine (29) Township Twenty-five (25) North, Range Forty-Five (45) E. W. M. and bounded and more particularly described as that tract of land lying north of the south line of the northeast quarter of the northwest quarter of section twenty-nine, projected eastward, and lying west of the west line of the southeast quarter of the

southeast quarter of section twenty, projected southward to a point of intersection in the bed of said Saltese Lake with said first extended line, and bounded by said meander line from a point where said west line of the southeast quarter of the southeast quarter of section twenty extended southward intersects said meander line of said Saltese Lake, thence along said meander line along said lots one and two of section twenty, and lots two, three and four of section twenty-nine, to a point where the south line of the northeast quarter of the northwest quarter of section twenty-nine intersects said meander line, embracing therein seventy-five (75) acres, more or less, the same having been reclaimed and now being dry land.

That the defendant be ousted and ejected therefrom; and that defendant be and he is hereby enjoined from molesting or disturbing plaintiff in the peaceable possession of said above described premises.

Done in open court this 22nd day of June, A. D. 1914.

E. H. SULLIVAN, *Judge.*

Service of copy accepted June 20/14.

SKUSE & MORRILLL,
Att'ys for Def't.

Filed June 22, 1914 at 10 o'clock A. M. Glenn B. Derbyshire, Clerk. E. E. Burton, Deputy.

26 Filed April 29th, 1915.

Department Two.

No. 12258.

W. M. RIDPATH, Respondent,

v.

LOUIS H. DENEE, Appellant,

This is an action in forcible detainer. The cause was tried to the court and a jury, and resulted in a verdict and judgment of restitution in favor of the plaintiff. The defendant has appealed.

The principal facts under which the controversy arose are as follows: The plaintiff for more than 20 years prior to the 9 day of March, 1914, was in the peaceable and quiet possession of 75 acres of land in Spokane county. This land was under cultivation and was enclosed by a substantial fence. In the night-time on March 9, 1914, the appellant, without permission of the plaintiff, broke the enclosure and entered upon the lands. On the next morning the plaintiff ordered the defendant to remove therefrom, which the defendant refused to do. Thereafter, on the 27 day of March, the plaintiff notified the appellant in writing to remove from the lands. The defendant also refused to comply with this notice for a period of

more than three days, whereupon this action was brought. The complaint alleged substantially these facts.

The defendant in answer to the complaint, denied the plaintiff's peaceable possession as alleged; admitted that defendant was occupying the lands, that he was notified in writing to remove therefrom, and that he had failed and refused so to do. As an affirmative defense the defendant alleged in substance, that the lands in question were unsurveyed, unappropriated public lands of the United States, and a part of the public domain, subject to settlement under the homestead laws of the United States; that on October 30, 1909, the defendant in good faith for the purpose of making a homestead entry thereon and acquiring title thereto, made settlement
27 upon the lands in question, has never abandoned the same, and is residing on the lands in good faith under the homestead laws; that at the time of making said settlement, he was over 21 years of age, a native born citizen of the United States, not the proprietor of more than 160 acres of land in any state or territory, and had never made entry of public lands under the homestead laws of the United States, and was qualified to make settlement upon and entry of public lands and to acquire title thereto; that at the time the defendant made settlement and established his residence upon the lands, the plaintiff was not in possession of any part thereof, and claimed no right therein; that the plaintiff is now wrongfully and unlawfully and without any right so to do, attempting to prevent the defendant from maintaining his residence thereon, and acquiring title thereto; that the lands described in the complaint are part of a contiguous body of lands containing 1,200 acres, which has never been surveyed by the government of the United States, and has never been disposed of by the government of the United States, but is unsurveyed and unappropriated government lands belonging to the United States, and open for settlement.

The plaintiff filed a motion to strike this affirmative defense, which motion was granted by the court. The appellant urges that the court erred in striking this affirmative defense, and in refusing to receive evidence of the facts therein stated. The statute, Rem. & Bal. Code, §811, provides:

"Every person is guilty of a forcible detainer * * * Who in the night-time, or during the absence of the occupant of any real property (unlawfully) enters thereon, and who, after demand made for the surrender thereof, refuses for the period of three days to surrender the same to such former occupant. The occupant of real property within the meaning of this subdivision is one who, for the five days next preceding such unlawful entry, was in the peaceable and undisturbed possession of such real property."

Section 825 provides:

"On the trial of any proceeding for any forcible entry or forcible detainer, the plaintiff shall only be required to show, in addition to a forcible entry complained of, that he was peaceably in the actual possession at the time of the forcible entry; or in addition to a
28 forcible detainer complained of, that he was entitled to the possession at the time of the forcible detainer."

These statutes are clearly peace statutes, and the issues in a case of this kind are but two: First, was the plaintiff for five days prior to the entry of the defendant, in the peaceable and actual possession of the land, and second, was the entry of the defendant a forcible entry and an unlawful detainer? The statute makes no provision for the trial of title or the right of possession in such a case. Other remedies are afforded by other statutes to try title or right of possession. This statute does not contemplate that a person, even though he be entitled to possession, may by force or stealth obtain possession. and thereby put upon the plaintiff the burden of proving the paramount title or a paramount right of possession. This court, in common with other courts, has frequently so held.

Gore v. Altice, 33 Wash. 335.
Chezum v. Campbell, 42 Wash. 560.
Meyer v. Beyer, 43 Wash. 368.
Dutcher v. Sanders (Cal.), 129 Pac. 809.

In Gore v. Altice, we said:

"The forcible entry and detainer law has always been recognized, ever since its enactment, as a law in the interest of peace, or to prevent violations of the peace and acts of violence in contentions over the possession of real property. It is a provision for a speedy determination, not of any title to the real estate, or of the right of possession, but of the question of who was in actual possession, and if such actual possession was disturbed; and the only question is, was the occupant in the actual and peaceable possession of the property at the time the possession was wrested from him? The statute provides that the occupant of real property, within the meaning of the law, is one who, for five days next preceding such unlawful entry, was in the peaceable and undisturbed possession of such real property."

The same in substance was held in the other cases cited, supra. It follows that the court properly struck the alleged affirmative defense. No case is cited to us which holds that in a case of forcible detainer the defendant may prove a paramount title or right of possession as a defense.

It is argued by the appellant that because the statute of the United States, §2289, U. S. Rev. Stat., authorizes the head of a
29 family, and a citizen of the United States to enter a quarter section or less of unappropriated public lands, that therefore the statutes relating to unlawful or forcible detainer are in conflict with the United States statute authorizing the entry of unappropriated government lands, and that the United States statute must prevail over the state statute. It is clear, we think, that there is no conflict between the state statutes and the United States statutes. The United States statutes have made no provision for determining conflicting rights under claim of possession, but the determination of these rights is left to the states to be regulated by state statutes. In Gauther v. Morrison, 232 U. S. 452, it was said:

"Generally speaking, it also is true that it is not a province of the courts to interfere with the Land Department in the administration of the public land laws, and that they are to be deemed in

process of administration until the proceedings for the acquisition of the title terminate in the issuing of a patent. But no interference with that department or usurpation of its functions was here sought or involved. It has not been invested with authority to redress or restrain trespasses upon possessory rights or to restore the possession to lawful claimants when wrongfully dispossessed. Congress has not prescribed the forum and mode in which such wrongs may be restrained and redressed, as doubtless it could, but has pursued the policy of permitting them to be dealt with in the local tribunals according to local modes of procedure. And the exercise of this jurisdiction has been not only sanctioned by the appellate courts in many of the public-land states, but also recognized and approved by this court. (Citing authorities.)"

The question in this case was, whether the respondent was in the peaceable and quiet possession of the real estate at the time of the forcible entry and unlawful detainer. If he was in the peaceable and quiet possession, then it follows, of course, that the appellant could not by force or by unlawful entry in the night-time dispossess him of that peaceable possession. As stated above, neither could the question of title, or the paramount right of possession, be determined in this action. There is clearly no conflict between the Federal and the state laws upon this question.

The appellant attempted to prove that the respondent was in possession of a large tract of unsurveyed government land unlawfully, and that he was not a qualified homesteader. The court ex-
30 cluded this evidence, and this is alleged as error. This contention is based upon §1 of the act of February 25, 1885, 23 Stat. L. 321, 322, to the effect that all enclosures of any public lands of the United States made by any person having no claim or color of title made or acquired in good faith, or made with a view to entry thereof at the proper land office, are declared to be unlawful, and are forbidden and prohibited. As we have seen above, it is plain, that the legal right of the parties to the possession of these lands cannot be tried in this action. But if the same could be tried, the appellant did not seek to show, either that the respondent was in possession of this particular tract of land without claim of right or color of title, or in bad faith, for it was apparently conceded that the respondent, or his tenant, was in actual possession of the tract of land in dispute, and that the respondent had purchased the land at a fair price and was in possession thereof claiming to be the owner. In Cameron v. United States, 148 U. S. 301, it was said, referring to this statute:

"The law was, however, never intended to operate upon persons who had taken possession under a bona fide claim or color of title; nor was it intended that, in a proceeding to abate a fence erected in good faith, the legal validity of the defendant's title to the land should be put in issue. It is a sufficient defense to such a proceeding to show that the lands enclosed were not public lands of the United States, or that defendant had claim or color of title, made or acquired in good faith, or an asserted right thereto, by or under claim made in good faith, * * *."

And in Wright v. Mattison, 18 How. 50, in defining what is color of title, the same court said:

"* * * A claim to property, under a conveyance, however inadequate to carry the true title to such property, and however incompetent might have been the power of the grantor in such conveyance to pass a title to the subject thereof, yet a claim asserted under the provisions of such a deed is strictly a claim under color of title, * * *."

It follows, therefore, that even though the respondent had enclosed the land claimed to have been enclosed, such enclosure was not necessarily unlawful, because the enclosure is not prohibited where it is under claim of right or color of title. The record
31 in this case conclusively shows that the respondent was holding the land which was surrounded by fence, under claim of right and color of title, and he and his predecessors had so held it for more than 20 years.

The appellant also claims that the court erred in refusing to direct a verdict in his favor, for the reason that the respondent had leased the land to one James S. Grant, and that the term of the lease had not expired. There was evidence to that effect, but the respondent and other witnesses testified that the lease had been surrendered several months prior to the unlawful entry by the appellant, and that the respondent, at the time of the unlawful entry, was in the actual possession of the land. This made a question for the jury. The court instructed the jury that if they found that Mr. Grant was occupying the premises under a written lease, that then the respondent could not maintain the action. Upon this question of fact the jury found for the respondent. It must be concluded, therefore, that the respondent, and not his tenant was in the actual occupancy of the land at the time of the unlawful entry.

We find no error in the judgment, and it is therefore affirmed.

MOUNT, *J.*

We concur:

MORRIS, *C. J.*
PARKER, *J.*
HOLCOMB, *J.*
CHADWICK, *J.*

32 *Authentication of Record.*

SUPREME COURT,
State of Washington, ss:

I, C. S. Reinhart, clerk of said court, do hereby certify that the foregoing pages, numbered from 1 to —, inclusive, are a true, full and complete transcript of the record and proceedings, in the case of W. M. Ridpath, plaintiff versus Louis H. Denee, defendant, so far as the same are necessary in the hearing of the writ of error herein issued out of the Supreme Court of the United States to this court, and also of the opinion of the court rendered in said cause, as the same now appear on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office, in Olympia, Washington, this — ——, 1915.

——— ———,
Clerk Supreme Court of Washington.

33 In the Supreme Court of the State of Washington in and for the County of Spokane.

No. 12258.

W. M. RIDPATH, Respondent,

vs.

LOUIS H. DENEE, Appellant.

Judgment.

This cause having been heretofore submitted to the Court, upon the transcript of the record of the Superior Court of Spokane County, and upon the argument of counsel, and the court having fully considered the same, and being fully advised in the premises, it is now, on this 9th day of June, A. D. 1915, on motion of Turner & Geraghty, of Counsel for Respondent, considered, adjudged and decreed, that the judgment of the said Superior Court be, and the same is hereby affirmed with costs; the petition for rehearing denied and that the said W. M. Ridpath have and recover of and from the said Louis H. Denee and from the Fidelity & Deposit Company of Maryland, surety, the sum of Two Hundred Eighty-Two and 20/100 Dollars with legal interest thereon from June 22nd, 1914 until paid and the costs of this action, taxed and allowed at Sixty Seven & 05/100 Dollars, and that execution issue therefor. And it is further ordered, that this cause be remitted to the said Superior Court for further proceedings, in accordance herewith.

34 Filed in Superior Court of Washington Aug. 8, 1915. C. S. Reinhart, Clerk.

In the Supreme Court of the State of Washington.

No. 12258.

W. M. RIDPATH, Plaintiff,

vs.

LOUIS H. DENEE, Defendant.

Petition for Writ of Error, Assignment and Prayer.

Considering himself aggrieved by the final decision of the Supreme Court of the State of Washington in rendering judgment

against him in the above entitled cause the defendant herein prays a Writ of Error from the said decision and judgment to the United States Court, and an order fixing the amount of a supersedeas bond.

And the said Louis H. Denee assigns the following errors in the records and proceedings in said case.

The supreme court of the State of Washington erred in holding and deciding that the forcible entry and detainer statutes of the State of Washington (Chap. 2, Rem. & Bal. Code) supersedes and is paramount to the Federal Homestead Laws of the United States, (Rev. Stat. Sec. 2289 et seq.: United States Comp. Stats. 1901, p. 1388, Act, May 14, 1880, 21 Stat. at L. 140 Chap. 89 Sec. 3, U. S. Comp. Stat. 1901, p. 1392: Rev. Stat. Sec. 2266 Act, March 1891, 26 Stat. at L. 1095, Chap 561 Sec. 5, U. S. Comp. Stat. 1901 p. 1535) and denies to defendant the right to show that the lands in question were unsurveyed public lands of the United States subject to settlement by defendant under said Federal Homestead Laws as a qualified homestead settler under said laws; And also denying to defendant the right to show his good faith, settlement and residence thereon under said federal homestead laws and also in denying to defendant the right to continue such settlement and residence upon said
35 lands and also in holding and deciding that plaintiff has the right to the possession and the use and occupation of said lands to the exclusion of the defendant; and also denying the right of defendant to prove that plaintiff was in the possession of a large tract of unsurveyed government land unlawfully and that he was not qualified to enter upon, use and occupy said lands under said Federal Homestead Laws, or any laws of the United States, and trespasser upon public lands of the United States.

These errors are more particularly set forth as follows:

The Supreme Court of the State of Washington erred in holding and deciding,

First. In holding and deciding that defendant was not entitled to prove the allegation of affirmative defense, namely: that the lands in question were unsurveyed, unappropriated public lands of the United States and a part of the public domain subject to settlement under the homestead laws of the United States: that on October 30, 1909 he in good faith for the purpose of making his homestead entry thereon and acquiring title thereto, made settlement upon said lands and has never abandoned the same and is residing thereon in good faith under the homestead laws of the United States: that at the time of making such settlement, he was over twenty-one years of age, a native born citizen of the United States, not the proprietor of over 160 acres of land in any state or territory, and had never made entry of public lands under the homestead laws of the United States, and was qualified to make settlement upon and entry of public lands and acquire title thereto; that at the time he made settlement and established his residence upon said lands the plaintiff was not in possession of any part thereof, and claimed no rights therein; that the plaintiff is now wrongfully and unlawfully and without any right so to
36 do, attempting to prevent defendant from maintaining his residence thereon, and acquiring title thereto; that the lands

involved in the complaint are a part of a contiguous body of lands containing approximately 1,200 acres which has never been surveyed by the government of the United States and has never been disposed of by the government of the United States but is unsurveyed and unappropriated public lands belonging to the United States and open for settlement.

Second. In sustaining the decision of the Superior Court in striking *from* the affirmative defense from defendant's answer and denying defendant the right to prove the allegations thereof.

Third. In not finding and deciding that defendant was entitled at the trial of the case to prove his qualifications as a homestead settler under the Federal Homestead Laws; that the lands in question were unsurveyed public lands of the United States, and the settlement and residence thereon by defendant as a homestead settler under said Federal Homestead Laws.

Fourth. In denying to defendant by said decision the right to occupy and reside upon the lands in question; such right being granted to defendant under the provisions of the homestead laws of the United States and the decisions of the United States Supreme Court.

Fifth. In denying to defendant the right to prove that plaintiff was holding and occupying the lands in question as against defendant in violation of the act of Congress, approved February 25, 1885 (23 St. at L. 321).

Sixth. In no- finding and deciding that the *un*forcement of the forcible entry and detainer laws of the State of Washington (Chap. 11, title VI, Rem. & Bal. Codes) in favor of the plaintiff would deprive the defendant of his substantial right guaranteed him under the homestead laws of the United States, and therefore said laws of the State of Washington could not be enforced against the defendant.

37 For which errors the defendant Louis H. Denee prays that said judgment of the Supreme Court of the State of Washington, dated the 29th day of April, 1915, he reversed and a judgment rendered in favor of defendant for his costs.

JOHN J. SKUSE,
FRED B. MORRILL,
Attorneys for Louis H. Denee.

STATE OF WASHINGTON,
Supreme Court, ss:

Let the Writ of Error issue upon the execution of a bond by Louis H. Denee, to W. M. Ridpath in the sum of $1,000.00 Dollars.

Dated Aug. 8th, 1915.

GEO. E. MORRIS,
Chief Justice Supreme Court of Washington.

38 Filed in Supreme Court of Washington Aug. 8, 1915. C. S. Reinhart, Clerk.

In the Supreme Court of the State of Washington in and for the County of Spokane.

No. —.

LOUIS H. DENEE, Plaintiff in Error,

vs.

W. M. RIDPATH, Defendant in Error.

Bond.

Know all men by these presents, That we, Louis H. Denee, as principal and the Fidelity & Deposit Company of Maryland, a corporation organized under the laws of the State of Maryland and authorized to transact the business of surety in the State of Washington, as surety, are held and firmly bound unto W. M. Ridpath in the sum of One Thousand ($1,000.00) Dollars, to be paid to the said W. M. Ridpath, to which payment well and truly to be made, we bind ourselves jointly and severally by these presents.

Sealed with our seals, and dated this 10th day of July 1915.

Whereas, the above named plaintiff in error seeks to prosecute his writ of error to the U. S. Supreme Court to reverse the judgment rendered in the above entitled action by the Supreme Court of the State of Washington.

Now, therefore, the condition of this obligation is such, that if the above named plaintiff in error shall prosecute his said writ of error to effect, and answer all costs and damages that may be ad-
39 judged not exceeding said sum of One Thousand ($1,000.00) Dollars if he shall fail to make good his plea, then this obligation to be void, otherwise to remain in full force and effect.

LOUIS H. DENEE,
By SKUSE & MORRILL, *His Attorneys.*
FIDELITY & DEPOSIT COMPANY OF MARYLAND,
By W. V. BERRY, *Its Attorney in Fact.*

Attest:

W. S. McCREA,
[SEAL.] *General Agent.*

Bond Approved, and to operate as a Supersedeas.
Dated 8th of August 1915.

GEO. E. MORRIS,
Chief Justice of the Supreme Court of Washington.

40 Filed in Supreme Court of Washington Aug. 16, 1915. C. S. Reinhart, Clerk.

12258.

Writ of Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Washington, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between W. M. Ridpath and Louis H. Denee, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened, to the great damage of the said Louis H. Denee, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, that said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

41

Witness the Honorable Edward D. White, Chief Justice of the United States, the 12th day of August, 1915.

[Seal of the United States District Court, Western District of Washington.]

FRANK L. CROSBY,
Clerk District Court United States, Western District of Washington, Northern Division.

Allowed,
GEO. E. MORRIS,
Chief Justice Supreme Court of Washington.

42 *Certificate of Lodgment.*

SUPREME COURT,
State of Washington, ss:

I, C. S. Reinhart, clerk of the said court, do hereby certify that there was lodged with me as such clerk on Aug. 8th & 16th 1915 respectively in the matter of W. M. Ridpath, versus Louis H. Denee;—

1. The original bond of which a copy is herein set forth.

2. Two copies of the writ of error, as herein set forth,—one for the defendant, and one to file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at my office, in Olympia, Washington, this August 23d 1915.

[Seal of the Supreme Court, State of Washington.]

C. S. REINHART,
Clerk Supreme Court of Washington.

43 12258.

Citation.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to W. M. Ridpath, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington D. C., within thirty days from the date hereof, pursuant to a writ of error filed in the office of the clerk of the Supreme Court of the State of Washington, wherein Louis H. Denee, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, The Chief Justice of the Supreme Court of the State of Washington, this 8th day of August, 1915.

GEO. E. MORRIS,
Chief Justice Supreme Court of Washington.

Attest:

[Seal of the Supreme Court, State of Washington.]

FRED S. GUYOT,
Dep. Clerk Supreme Court of Washington.

SPOKANE, WASHINGTON, August 13th 1915.

We, attorneys of record for the defendant in error in the above

entitled case, hereby acknowledge due service of the above citation, and enter an appearance in the Supreme Court of the United States.

D. W. HENLEY,
J. M. GERAGHTY,
GEORGE TURNER,
Attorneys for W. M. Ridpath.

Filed in Supreme Court of Washington Aug. 16, 1915. C. S. Reinhart, Clerk.

44 *Return to Writ.*

UNITED STATES OF AMERICA,
Supreme Court of Washington, ss:

In obedience to the commands of the within writ I herewith transmit to the Supreme Court of the United States a duly certified transcript of the record and proceeding in the within entitled case, together with all things concerning the same, so far as the same are necessary in the hearing of said suit.

In witness whereof, I hereunto subscribe my name and affix the seal of said Supreme Court of Washington, in the City of Olympia, this 23d day of August 1915.

C. S. REINHART,
Clerk Supreme Court of Washington.

Costs of Suit.

Plaintiff's costs, $— paid by W. M. Ridpath.
Defendant's costs $— paid by Louis H. Denee.
Costs of transcript, $8.15 paid by Louis H. Denee.

[Seal of the Supreme Court, State of Washington.]

C. S. REINHART, *Clerk.*

45 In the Supreme Court of the State of Washington in and for Spokane County.

No. 12258.

W. M. RIDPATH, Respondent,

vs.

LOUIS H. DENEE, Appellant.

Clerk's Certificate.

I, C. S. Reinhart, Clerk of the Supreme Court of the state of Washington, hereby certify that the above and foregoing is a full, true and correct transcript of the record in the above entitled case, so far as the

same is necessary under the hearing of the writ of error herein issued out of the Supreme Court of the U. S. to this Court, as the same now appears of record in my office, and as I am required to transmit to the Supreme Court of the United States. And I hereby transmit such transcript together with the original citations and the original writ of error, to the Supreme Court of the United States.

In testimony hereto I have hereunto set my hand and affixed the seal of said Supreme Court at Olympia, Wash., this 23d day of August 1915.

[Seal of the Supreme Court, State of Washington.]

C. S. REINHART, *Clerk.*

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916

LOUIS H. DENEE,

Plaintiff in Error.

vs.

W. M. RIDPATH,

Respondent.

No. 147

BRIEF OF PLAINTIFF IN ERROR

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Supreme Court of the United States

OCTOBER TERM 1916

LOUIS H. DENEE,
Plaintiff in Error,
vs.
W. M. RIDPATH,
Respondent.
No. 449

STATEMENT.

This is an action in forcible detainer brought by respondent, in which it is alleged in his complaint that the lands involved are dry lands, and that he has been in the peaceable and undisturbed possession thereof for more than five days next preceding the entry thereon by plaintiff in error, and that said lands were enclosed by a good and substantial fence then and there being maintained by respondent. That on or about the 9th day of March, 1914, during respondent's absence therefrom, and in the nighttime plaintiff in error broke the enclosure maintained by respondent and entered upon said lands and has since continuously remained thereon. That on the 27th day of March, 1914, he notified the plaintiff in error in writing to remove from said lands and to surrender the same, and that plaintiff in error has, for a period of more than three

days from the date of such demand, refused to remove therefrom or surrender the same. That being kept out of the possession thereof will occasion a loss and damage to respondent in the sum of $3,000.00. (Record pp. 2, 3.)

In answer to the complaint, plaintiff in error admitted that the lands in question are dry lands comprising 75 acres more or less, denied the possession thereof by respondent as by him alleged, as well as the breaking and entering thereon by plaintiff in error; admitted that he was occupying and in the possession of the lands and that respondent had notified him in writing to remove therefrom and that he had failed and refused so to do, and also denied the damages to respondent as alleged. (Record p. 4.)

As an affirmative defense plaintiff in error alleged that the lands in question are and ever have been unsurveyed, unappropriated lands of the United States and a part of its public domain, subject to settlement under the Federal Homestead Laws of the United States; that on the 30th day of October, 1909, and long prior to the time respondent claimed to have been in possession thereof, plaintiff in error, in good faith as a settler under the Federal Homestead Laws, for the purpose of making a homestead entry thereon and acquiring title thereto from the United States under said laws, made settlement upon the lands in question and has never since abandoned his settlement thereon and is still occupying and residing upon said lands

in good faith under said laws. That at the time plaintiff in error made such settlement there was no one residing upon said lands and no other person or persons had prior thereto settled upon any portion thereof claiming same under any law of the United States, nor were there any improvements thereon made by any person claiming said lands as a settler under the Federal Homestead Laws or under any law of the United States, and that plaintiff in error is and always has been the only person occupying said lands or any portion thereof under said Homestead Laws or under any law of the United States. That at the time of making such settlement, plaintiff in error was over the age of twenty-one years, a native born citizen of the United States, not the proprietor of more than 160 acres of land in any State or Territory, and had never made entry of public lands under the Federal Homestead Laws, and was and is in every way qualified to make settlement upon and entry of public lands and acquire title thereto under the Federal Homestead Laws. That at the time he made settlement upon said lands on the 30th day of October, 1909, he erected a frame lumber house thereon, suitable for habitation at all seasons of the year, furnishing same with all necessary cooking and household utensils and established his residence therein, and is now residing upon said lands and has never abandoned his settlement and residence thereon. That in making settlement and residence upon said lands he did so in good faith with the bona fide intention to continue to reside upon,

occupy, cultivate and improve the same as required under the Federal Homestead Laws, and to fully comply with all of the requirements of said laws, and for no other purpose, and in order to comply with the requirements of said laws and acquire title to said lands from the United States thereunder, it becomes and is necessary for plaintiff in error to reside upon and cultivate the lands in question and to have the possession thereof for a period of five years, and unless he can so reside upon, cultivate and have possession thereof during such period of time, he cannot comply with the requirements of said Homestead Laws and sustain and maintain his rights to said lands and acquire title thereto from the United States.

That at the time plaintiff in error made settlement and established his residence upon said lands respondent was not in possession of any part thereof and claimed no right therein or to the possession thereof, and had never at any time had possession thereof, or any right to the possession thereof, and that respondent with the intent and purpose to wrongfully and unlawfully cultivate said lands, is now wrongfully and unlawfully, and without any right so to do, attempting to prevent plaintiff in error from maintaining his residence thereon and acquiring title thereto under the Homestead Laws of the United States. And for the purpose of carrying out said wrongful and unlawful intent, respondent has ordered and directed plaintiff in error to remove from said lands and to give up his possession thereof, and has threatened to remove him

and his house therefrom, and has threatened him with arrest and imprisonment, and in many other ways has threatened and attempted to intimidate plaintiff in error from continuing his settlement and residence upon said lands, and prevent him from complying with the requirements of the Federal Homestead Laws in the matter of settlement, residence upon, and cultivation of said lands, and thereby prevent plaintiff in error from making the necessary legal proofs to the Land Department of his settlement, residence and cultivation of said lands. That by virtue of the settlement and residence upon said lands as made by plaintiff in error, and by virtue of same being unsurveyed public lands of the United States, he is entitled to use, occupy and control the same, and to the possession thereof, and to reside thereon and make same his home and place of residence, and that respondent, by virtue of his acts and threats as alleged, is wrongfully interfering with plaintiff in error and preventing him from exercising his rights in and to said lands under the Homestead Laws of the United States. That respondent has never made settlement upon said lands, or upon any portion thereof, and has never attempted to use, occupy or improve the same or claim any right thereto under the Homestead Laws of the United States, or under any law of the United States.

That the lands described in the complaint are a part of a contiguous body of land containing approxi-

mately 1200 acres lying and being in Sections 4 and 5, Township 24, and in Sections 20, 28, 29, 32 and 33 in Township 25 North, Range 45 E. W. M., which have never been alienated or disposed of by the United States, and all thereof are and ever have been unsurveyed, unappropriated government lands belonging to the United States as a part of its public domain and subject to and open for settlement under the Homestead Laws of the United States.

That the possession of said lands is of great value to plaintiff in error, and to be dispossessed thereof will cause plaintiff in error loss and damage in the sum of $3,500.00.

Wherefore, plaintiff in error prayed that said action be dismissed. (Record pp. 5-6-7.)

To said affirmative defense, respondent moved to strike each and every paragraph and part thereof for the reason that the defenses therein contained were sham, frivolous and irrelevant. (Record p. 8), which motion was brought on to be heard, and after argument thereon was by the court allowed, and all of said affirmative defense stricken; to which exceptions were allowed plaintiff in error. (Record pp. 8-9.)

Upon the trial of the case plaintiff in error offered to prove and show to the Court and jury by the Register of the United States Land Office at Spokane, Wash., and from the records of said office, that the lands in question were unsurveyed, unappropriated

public lands of the United States, and that same had never been alienated or disposed of by the government, which offer of proof under the objections of respondent, was rejected and exceptions taken and allowed plaintiff in error. (Record p. 9.)

Plaintiff in error also offered to prove and show to the court and jury that he was qualified under the Homestead Laws of the United States to make settlement upon, and acquire title to, public lands of the United States, and that he in good faith for the purpose of residing upon said lands and cultivating and improving the same and acquiring title thereto from the government, made settlement and established his residence upon the lands in question on the 30th day of October, 1909, and has never since voluntarily abandoned the same, and that his residence and occupation thereof is under the Homestead Laws of the United States, and not otherwise, and at the time he made settlement and established his residence upon said lands, no other person was residing thereon, or had any improvements thereon, claiming same under said Homestead Laws, or under any law of the United States. He further offered to prove that respondent had never made settlement upon said lands under said Homestead Laws or under any law of the United States, and was not qualified under the Federal Homestead Laws to make settlement upon and acquire title to said lands under said Homestead Laws or under any law of the United States, and that the occupation

of said lands by respondent was for the only purpose of grazing, cropping and cutting hay thereon for his own profit, and that respondent is not a qualified Homestead settler under the Homestead Laws of the United States, being proprietor of more than 160 acres of land in the State of Washington. That said lands are, and were at the time plaintiff in error made his settlement and residence thereon, good agricultural lands susceptible of being farmed and cultivated as other agricultural lands and only valuable for agricultural purposes, and that the only use to which said lands could be put is for farming and raising of agricultural crops thereon; which offer of proof under the objections of respondent, was rejected and exceptions taken by plaintiff in error and allowed. (Record pp. 9-10.)

In its instructions to the jury the court, among other things, instructed the jury as follows: "The court instructs the jury that in this action the title to the property in question is not involved and it is not material whether the land is owned by the United States or open to homestead settlement or not," and also "That whether the plaintiff was lawfully or unlawfully in the possession of the premises is a matter of no consequence in this suit and cannot be considered by the jury." (Record pp. 12-13.)

Upon a verdict of the jury in favor of respondent, judgment was entered for double the amount of the verdict for damages, and also ousting and ejecting

plaintiff in error from the lands in question and enjoining plaintiff in error from disturbing or molesting respondent in the possession of said premises. (Record pp. 16-17.)

From the rulings and orders of the court, and from the judgment entered in favor of respondent and against plaintiff in error, an appeal was taken to the Supreme Court of the State of Washington, which court on the 29th day of April, 1915, filed its decision sustaining the judgment of the lower court. (Record pp. 17-18-19-20-21.)

This cause is now before this court upon a Writ of Error.

SPECIFICATION OF ERRORS.

I.

The Supreme Court of the State of Washington erred in holding and deciding that the forcible entry and detainer statutes of the State of Washington (Chap. 2 Rem. & Bal. Codes) supersedes and is paramount to the Federal Homestead Laws of the United States (Rev. Stats. Sec. 2289 et seq.; U. S. Comp. Stats. 1901 p. 1388, Act May 14, 1880; 21 Stat. At. L. 140, Chap. 89, Sec. 3; U. S. Comp. Stats. 1901, p. 1392; Rev. Stat. Sec. 2266, Act March 3rd, 1891; 26 Stat. At. L. 1095, Chap. 561, Sec. 5; U. S. Comp. Stats. 1901, p. 1535); and denying to plaintiff in error the right to show that the lands in question were unsur-

veyed public lands of the United States, subject to settlement by plaintiff in error under said Federal Homestead Laws, as a qualified homestead settler thereunder, and also denying to him the right to show his good faith, settlement and residence thereon under said laws; and also denying to plaintiff in error the right to continue such settlement and residence upon said lands, and also holding and deciding that respondent has the right to the possession and to the use and occupation of said lands to the exclusion of plaintiff in error; and also denying the right to plaintiff in error to prove that respondent was in the possession of a large tract of unsurveyed government lands unlawfully and that he was not qualified to enter upon, use and occupy said lands under such Homestead Laws, or any law of the United States, and was a trespasser upon public lands of the United States.

II.

In sustaining the decision of the Superior Court in striking the affirmative defense from the Answer of plaintiff in error, wherein he alleged as follows:

"That the lands and premises set forth and described in the complaint of the plaintiff, are and during all of the times herein mentioned were, unsurveyed and unappropriated public lands of the United States and a part of the public domain, subject to settlement under the Homestead Laws of the United States, and on the 30th day of October, 1909, and long prior to

the time that plaintiff claimed or pretended to have any possession thereof, this defendant, in good faith as a homestead settler and for the purpose of thereafter making a homestead entry thereon, and acquiring title thereto from the government of the United States under the Homestead Laws, made settlement upon the lands described in plaintiff's complaint, and all thereof, and has never since abandoned his settlement thereon, and is still occupying said lands and all thereof, as a homestead settler thereon, in good faith under the homestead settlement laws of the United States. That at the time defndant settled upon said lands, as aforesaid, there was no one residing thereon, or on any part or portion thereof, and no other person had prior thereto settled upon said lands, or any part thereof, claiming same as a settler under the Homestead Laws of the United States, or under any law of the United States, and there was not at the time this defendant settled upon said lands, as aforesaid, any improvements thereon, or upon any part or portion thereof, made by any person claiming said lands as a settler under the Homestead Laws of the United States, or under any law of the United States, and this defendant was at the time of such settlement, and ever since has been, and still is, the only person occupying such lands, or any portion thereof, under the homestead laws of the United States, or under any law of the United States. That at the time of the making of such settlement, this defendant was over the age of twenty-one years, a native born citizen of the

United States, and not the proprietor of 160 acres of land in any state or territory of the United States, and had never, prior thereto, made any entry of public lands under the homestead laws of the United States, and then was, and now is, in every way qualified to make settlement upon and entry of public lands, and acquire title thereto from the United States, under the homestead laws of the United States. That in making his said settlement upon said lands, as aforesaid, this defendant, on the 30th day of October, 1909, erected upon said tract of land a frame house 10x12 feet in size, with door, window and floor, suitable for habitation at any and all seasons of the year. That he then and there, on said date, furnished said house with all necessary cooking and household utensils, and entered into the possession and occupation of said house and established his residence therein, and is now residing thereon, and has never since said 30th day of October, 1909, abandoned his settlement and residence upon said land. That in making settlement upon and residing upon said lands, as aforesaid, this defendant did so in good faith with a bona fide intention to continue to reside upon and occupy said lands and cultivate and improve the same, as required under the homestead laws of the United States, and this defendant settled upon and established his residence theron with the full intention to occupy, improve and reside thereon, and comply with all the requirements of the homestead laws of the United States, and for no other purpose whatever. That in order to

comply with the requirements of the homestead laws of the United States and acquire title to the lands so settled upon by defendant, as aforesaid, under said laws, it becomes, and is, necessary for this defendant to reside upon and cultivate such lands, and to have possession thereof for a period of five years, and unless this defendant can reside upon, cultivate and have possession of said lands for and during such period of time, this defendant cannot comply with the requirements of the homestead laws of the United States and sustain and maintain his rights to said lands and acquire title thereto from the government of the United States under the homestead laws of the United States.

That at the time defendant made settlement and established his residence upon said lands, the plaintiff was not in possession thereof, or of any part thereof, and did not claim any right therein, or in the possession thereof, and has never at any time had possession thereof, or any part thereof, or any right thereto, or to the possession thereof, and said plaintiff with the intent and purpose to wrongfully and unlawfully cultivate said land so settled upon by defendant, as aforesaid, is now wrongfully and unlawfully and without any right so to do, attempting to prevent defendant from maintaining his residence upon said lands and acquire title thereto under the home-

stead laws of the United States, and, in order to carry out the said wrongful and unlawful intent of plaintiff, said plaintiff has ordered and directed defendant to remove from said lands and to give up his possession thereof, and has threatened to remove the defendant therefrom, and to remove defendant's house therefrom, and has unlawfully threatened defendant with arrest and imprisonment, and in many other ways threatened and tried to intimidate the defendant from continuing his settlement and residence upon said lands, and by so doing prevent this defendant from making the necessary legal proofs to the land department of his settlement, residence, cultivation and improvements of said land.

That by virtue of the settlement and residence made upon said lands by defendant, and by virtue of the same being unsurveyed lands of the United States, this defendant is entitled to use, occupy and control the same and to the possession thereof, and to reside thereon and make same his home and place of residence, and plaintiff, by virtue of his threats and acts aforesaid is wrongfully and unlawfully interfering with defendant and preventing defendant from exercising his rights under the homestead settlement laws of the United States. That plaintiff has never made settlement upon said lands, or upon any part thereof, and has never attempted to use, occupy or improve the same, or to claim any rights therein under the home-

stead laws of the United States, or under any law of the United States.

That the lands and premises described in the complaint of the plaintiff are a part of a contiguous body of lands containing 1200 acres lying and being in Sections 4 and 5, Township 24, and a portion of Sections 20, 28, 29, 32 nd 33 in Townships 25, North Range 45, E. W. M., which have never been surveyed by the government of the United States, and which have never been alienated or disposed of by the government of the United States, and all of which ever has been, and now is, unsurveyed government lands belonging to the government of the United States, as a part of its public domain, and subject, to and open for, settlement under the homestead laws of the United States." (Record pp. 5-6-7).

III.

In sustaining the decision of the Superior Court in rejecting evidence offered by plaintiff in error, as follows:

> "Mr. Morrill: The defendant at this time offers to prove and show to the court and jury by testimony of Hal J. Cole, the register of the United States Land Office at Spokane, Washington, and by the official records of said land office, that the land and premises in question are a part of a contiguous body of land containing approximately 1200 acres, which has never been surveyed by the government of the United States, and which has never been alienated or disposed of by the government of the United States, and is now

and ever has been unsurveyed government land, belonging to the government of the United States, as a part of its public domain, and subject to and open for settlement under the homsetead laws of the United States."
Record p. 9.)

IV.

In sustaining the decision of the Superior Court in rejecting evidence offered by plaintiff in error, as follows:

"Mr. Morrill: Defendant also offers to prove and show to the court and jury by his own testimony that on the 30th day of October, 1909, he was over the age of 21 years, a native born citizen of the United States, and not the proprietor of 160 acres of land in any state or territory of the United States, and had never prior to said date made any entry on public land under the homestead laws of the United States, or settled thereon as a homestead settler under the homestead laws of the United States, and then was and is now in every way qualified to make settlement upon and entry of public lands of the United States, and acquire title thereto under the homestead laws of the United States; that on the 30th day of October, 1909, defendant in good faith, as a homestead settler, and for the purpose of making homestead entry and acquiring title to said lands in question, from the government of the United States, under the homestead law, made settlement upon the land in question and all thereof, and has never since abandoned said settlement thereon, and is still occupying said land and all thereof, as a homestead settler in good faith under the homestead laws of the United States. That at the time defendant settled upon said land there was no one residing thereon, or upon any part or portion

thereof, and no person had prior thereto settled upon said lands, or upon any part or portion thereof, claiming same under the homestead laws of the United States, or under any law of the United States, and there was not at the time defendant made said settlement upon said land, any improvement thereon or upon any part or portion thereof, made by any person claiming said land as a settler under the homestead laws of the United States or under any law of the United States, and that this defendant was at the time of such settlement and ever since has been and still is the only person occupying the lands in question or any part or portion thereof, under the homestead laws of the United States or under any law of the United States. That in making said settlement upon said lands, defendant, upon the 30th day of October, 1909, erected thereon a frame lumber house, 10x12 feet in size, with doors, windows and floor, suitable for habitation at any and all seasons of the year; that he then and there upon said date, furnished said house with the necessary cooking and household utensils, and entered into the possession and occupation of said house, and established his residence therein, and is now residing upon said tract, and has never since said 30th day of October, 1909, voluntarily abandoned same. That in making settlement upon and in residing upon said land, defendant did so with the bona fide intention of continuing to reside upon and occupy said land and to cultivate and improve the same as required by the homestead laws of the United States, and to comply with all of the requirements of the homestead laws of the United States, with the full intention and purpose of occupying and residing thereon, and complying with all requirements of the homestead laws of the United States, and for no other purpose. That at the time defendant made his settlement and established his residence upon

said land, on the 30th day of October, 1909, plaintiff was not in possession thereof, or any part or portion thereof, and did not claim any right therein, or in the possession thereof. That said lands are, and were at the time defendant made his settlement and established his residence thereon, good agricultural lands susceptible of being farmed and cultivated as other agricultural lands, only valuable for agricultural purposes, and the only use said lands can be put to, is for farming and raising of agricultural crops thereon." (Record pp. 9-10.)

V.

In sustaining the decision of the Superior Court in rejecting evidence offered by plaintiff in error, as follows:

"Mr. Morrill: Defendant also offers to prove and show to the court and jury that the plaintiff has never at any time resided upon the lands in question or upon any part or portion thereof, and that the only occupation by the plaintiff of the land in question, has been for grazing, cropping and cutting of hay thereon, for his own profit, and that the plaintiff is not a qualified homestead settler under the homestead laws of the United States, being the proprietor of more than 160 acres of land in the State of Washington." (Record p. 10.)

VI.

In sustaining the Superior Court in its instruction to the jury as follows:

"The court instructs the jury that in this action the title to the property in question is not involved, and it is not material whether the land is owned

by the United States or open to homestead settlement or not," and also "That whether the plaintiffs were lawfully or unlawfully in the possession of the premises is a matter of no consequence in this suit and cannot be considered by the jury" (Record pp. 12-13.)

VII.

In not finding and deciding that the enforcement of the forcible entry and detainer laws of the State of Washington (Chap. 2 Rem. & Bal. Codes), in favor of respondent, would deprive plaintiff in error of a substantial right guaranteed to him under the Homestead Laws of the United States, and therefore that said laws of the State of Washington could not be enforced against plaintiff in error.

VIII.

In holding that an act of the Legislature of the State of Washington supersedes and is paramount to an act of Congress.

IX.

In not directing the trial court to dismiss the action for want of jurisdiction.

X.

In sustaining the judgment as made and entered by the Superior Court.

ARGUMENT.

The question here presented is whether or not in the administration of the laws in a State court, an Act of the State Legislature shall be considered paramount to an Act of Congress, or, put in another form, will an act of a State Legislature be enforced when, by its enforcement a litigant will be deprived of a substantial right guaranteed him under an Act of Congress, or, going still further, will the legislative Act only be considered and the Congressional Act be swept aside as unworthy of consideration? Here we have a case in which respondent comes into court seeking the enforcement of a State statute, basing his whole right to the possession of the lands involved thereon, while plaintiff in error comes into court and shows, or attempts to show, that every right which he claims is a right guaranteed him under an Act of Congress, basing his whole right to the lands in question and the right to the possession thereof, thereon. And under the rulings and decisions of the court the State statute is given full consideration and its provisions enforced to the letter in favor of respondent, while the Acts of Congress and the right claimed by plaintiff in error thereunder are not even deemed worthy of consideration; his affirmative defenses in which the rights claimed by him under the Federal Law are fully set forth, are stricken as sham, frivilous and irrelevant, and evidence offered which, if accepted and proven, would give to plaintiff in error the right to

the possession and occupation of the lands in question under an Act of Congress, is rejected.

That an Act of Congress supersedes and is paramount to an Act of a State legislature, cannot of course be questioned. In this country there are four kinds of laws which the courts cannot overlook and by which they are governed in the administration of justice, as follows: (1) The Federal Constitution, (2) Federal Statutes, (3) State Constitution, and (4) The State Statute. The Federal Constitution not only grants certain powers to Congress, but recognizes certain powers in the States, but as the nation takes precedence of the States, this constitution, which is the supreme law of the land, and the laws enacted by Congress under it, are preferred to all State constitutions and statutes, and if any conflict arises between them, the latter must give way. When it is shown that an Act of a State legislature infringes either the Federal Constitution or a Federal Statute, or takes away a right granted to a litigant either under such constitution or statute, such legislative Act cannot prevail or be enforced. We deem it unnecessary to cite authorities upon this question.

That Congress under Section 3, Article IV of the Constitution of the United States has the sole power to dispose of the public lands of the United States, must be conceded, and neither a State legislature or a State court can in any manner interfere with the power so placed in the hands of Congress under the

constitution; consequently when Congress, by the enactment of the Federal Homestead Laws, granted to a citizen of the United States over the age of twenty-one years, who had not previously made a homestead entry of public lands and was not the proprietor of more than 160 acres of land in any state or territory, the right to settle upon, occupy, cultivate and reside upon surveyed or unsurveyed lands of the United States, and by so doing acquire title thereto from the government, it granted a right that when once exercised by a person having the requisite qualifications, must be protected by the courts instead of being ignored; and also a right which cannot, by any Act of a State legislature, be in any manner interfered with, abrogated or restricted. Therefore it must follow as a matter of course, that when an Act of a State legislature will, by the enforcement of its provisions, interfere with or prevent the exercise or enjoyment of the right thus granted by Congress under the Federal Constitution, the State legislative Act must give way and the Act of Congress be upheld. When, therefore, plaintiff in error by his affirmative defenses set forth his qualifications as a homestead settler under the Federal Homestead Laws, and that the lands in question were unsurveyed public lands of the United States, agricultural in character, subject to his settlement under said laws, and that his settlement and residence thereon and occupation thereof were made in good faith under said laws for the purpose of acquiring title thereto from the government

thereunder, he alleged that he was asserting a right granted him under an Act of Congress under which he not only had the right to go upon said lands and in good faith make settlement and establish his residence thereon, but thereafter he had the further right under said Act of Congress to remain there and to the possession of the land to the exclusion of respondent, who, according to the allegations of the complaint, and the affirmative defenses set forth in the Answer of the plaintiff in error is a trespasser upon the public domain of the United States. In other words plaintiff in error by the allegations of his affirmative defenses and offers of proof sets forth under an Act of Congress a perfect defense to respondent's cause of action and a defense, which, if proven, would prevent respondent from a recovery under his complaint and deprive the State courts of jurisdiction to enforce the law under which the action is brought. It must be borne in mind that not only do said affirmative defenses set forth that the lands in question are unsurveyed public lands subject to settlement under the Federal Homestead Laws, and the qualifications of plaintiff in error as a homestead settler and his settlement and residence upon said lands, but it is also alleged that respondent has never made settlement thereon or attempted to use, occupy or improve same or claim any right threto under the Federal Homestead Laws, or under any law of the United States, and further that respondent is attempting to prevent plaintiff in error from maintaining his residence

thereon and acquiring title to the lands in order that respondent may wrongfully and unlawfully crop and cultivate the lands for profit. Section 2289, U. S. Rev. Stat. as amended by the Act of March 3, 1891, 26 Stat. 1095, provides that:

> "Every person who is the head of a family, or who has arrived at the age of twenty-one years and is a citizen of the United States, or who has filed his declaration of intention to become such, as required by the naturalization laws, shall be entitled to enter one-quarter section, or a less quantity, of unappropriated public lands, to be located in a body in conformity to the legal sub-divisions of the public lands; but no person who is the proprietor of more than one hundred and sixty acres of land in any state or territory, shall acquire any right under the homestead law." * * *

Under this provision every person possessing the requisite qualifications is granted the right to enter one-quarter section of the public domain, and under Section 2291, such entryman is required to reside upon the lands so entered for a period of five years and when so resided upon and cultivated, upon making proper proof thereof, is entitled to a patent from the government conveying title to the land so entered, cultivated and resided upon. Said Section 2291 is as follows:

> "No certificate, however, shall be given, or patent issued therefor, until the expiration of five years from the date of such entry; and if at the expiration of such time, or at any time within two years thereafter, the person making such entry; or if he be dead, his widow; or in case of her death,

his heirs or devisee; or in case of a widow making such entry, her heirs or devisee, in case of her death, proves by two credible witnesses that he, she, or they have resided upon or cultivated the same for the term of five years immediately succeeding the time of filing the affidavit, and makes affidavit that no part of such land has been alienated, except as provided in section twenty-two hundred and eighty-eight, and that he, she or they will bear true allegiance to the Government of the United States; then, in such case, he, she, or they, if at that time citizens of the United States, shall be entitled to a patent, as in other cases provided by law."

We next find that under Section 3, of the Act of May 14th, 1880 (21 Stat. L. 140), these provisions are extended to *unsurveyed* as well as surveyed public lands. Said section reads as follows:

"That any settler who has settled, or who shall hereafter settle, on any of the public lands of the United States, whether surveyed or *unsurveyed*, with the intention of claiming the same under the homestead laws, shall be allowed the same time to file his homestead application and perfect his original entry in the United States land office as is now allowed to settlers under the pre-emption laws to put their claims on record, and his right shall relate back to the date of settlement, the same as if he settled under the pre-emption laws."

Under the pre-emption law, as it existed at the passage of said act, a settler upon *unsurveyed* lands was allowed ninety days in which to make his filing, after the plats of survey were filed in the local land office and the lands opened for entry. (Sec. 2266, U. S. Rev. Stat.)

We therefore find that Congress, under the power conferred by the constitution, in the disposition of the public domain, has granted the right to any person possessing the necessary qualifications to settle upon, occupy, improve and reside upon public lands, *unsurveyed* as well as surveyed, and by and through such settlement, residence and cultivation acquire title thereto from the government. And that right, being granted by Congress, which under the Federal Constitution has the sole and exclusive control of the public lands, it is not within the power of any State Legislature to pass a law which will in any manner infringe upon that right. We do not want to be understood, however, as contending that the forcible entry and forcible detainer laws, as they now stand upon the statutes of the State of Washington, are unconstitutional and void as a whole. But what we do contend for, is that they cannot be made to apply to public lands of the United States, and by the enforcement of their provisions a good faith settler upon such lands ousted therefrom, and thereby deprived of a substantial right granted to him by an Act of Congress under the Constitution of the United States; and when a court finds that by the enforcement of their provisions such a result will follow, the provisions of the federal statutes must be declared paramount to the State Statutes, the Federal Statute upheld and the rights granted thereunder to the settler protected, and *the case dismissed.*

Again, the pleadings in this case, as they stand before the court, show that if plaintiff had been allowed to prove and could prove the allegations therein set forth that respondent in withholding the lands in question from plaintiff in error, is violating Sections 1 and 3 of the Act of February 25th, 1885 (23 Stat. L. 321, 322).

Section 1 provides as follows:

> "That all *inclosures* of any public lands in any state or territory of the United States, heretofore or to be hereafter made, erected, or constructed by any person, party, association, or corporation, to any of which land included within the inclosure the person, party, association, or corporation making or controlling the inclosure had no claim or color of title made or acquired in good faith, or an asserted right thereto by or under claim, made in good faith with a view to entry thereof at the proper land office under the general laws of the United States at the time any such inclosure was or shall be made, are hereby declared to be unlawful, and the *maintenance,* erection, construction, or control of any such *inclosure* is hereby forbidden and prohibited; and the assertion of a right to the exclusive use and occupancy of any part of the public lands of the United States in any state or any of the territories of the United States, without claim, color of title, or asserted right as above specified as to inclusoure, is likewise declared unlawful, and hereby prohibited."

And Section 3, so far as it relates to the matter in question, provides:

> "That no person * * * by any *fencing or enclosing* * * * shall prevent or obstruct

> * * * any person from peaceably entering upon or establishing a settlement or residence on any tract of public land subject to settlement or entry under the public land laws of the United States."

In his complaint, respondent alleges that he is in the possession of, and has *enclosed,* the lands in question, while plaintiff in error alleges that said lands are public lands of the United States, and that respondent is not claiming same under the Federal Homestead Laws, or under any law of the United States, and that, with the intent and purpose of wrongfully and unlawfully cultivating said lands he is preventing appellant from making and maintaining his settlement and residence thereon. If these allegations were proven a violation of the Federal Statutes, as above referred to, would be shown on the part of respondent; but under the rulings of the trial court and sustained by the State Supreme Court plaintiff in error has been denied the right to make this proof, and his affirmative defense stricken.

In the case of Mondou vs. New York, N. H. & H. R. Co., 223 U. S. 1 (56 L. Ed. 327), 38 L. R. A. (N. S.) 44, cited by Justice Van Devanter in his opinion in the case of Gauthier vs. Morrison, to which we will hereafter further refer, in speaking upon the question here under discussion, the Court says:

> "The third question, whether those regulations supersede the laws of the states in so far as the latter cover the same field, finds its answer in the following extracts from the opinion of Chief Jus-

tice Marshall in M'Culloch v. Maryland, 4 Wheat. 316, 4 L. Ed. 579:

'If any one proposition could command the universal assent of mankind, we might expect it would be this,—that the government of the Union, though limited in its powers, is supreme within its sphere of action. This would seem to result necessarily from its nature. It is the government of all; its powers are delegated by all; it represents all, and acts for all. Though any one state may be willing to control its operations, no state is willing to allow others to control them. The nation, on those subjects on which it can act, must necessarily bind its component parts. But this question is not left to mere reason; the people have, in express terms, decided it, by saying, "this Constitution, and the laws of the United States, which shall be made in pursuance thereof," "shall be the supreme law of the land," and by requiring that the members of the state legislatures, and the officers of the executive and judicial departments of the states, shall take the oath of fidelity to it. The government of the United States, then, though limited in its powers, is supreme; and its laws, when made in pursuance of the Constitution, form the supreme law of the land, "anything in the Constitution or laws of any state to the contrary notwithstanding."

'This great principle is that the Constitution and the laws made in pusurance thereof are supreme; that they control the Constitution and laws of the respective states, and cannot be controlled by them.' "

In the case of Gauthier vs. Morrison (232 U. S. 452) heretofore referred to, Justice Van Devanter in considering the rights of a homestead settler upon public lands says:

"The homestead law in terms subjects unsur-

veyed public lands, if agricultural and unappropriated, to settlement by persons having the requisite qualifications and intending to comply with its requirements as a means of acquiring the title, and also *plainly confers upon the settler the right of possession, without which compliance with those requirements would be impossible.* Rev. Stat. Secs. 2289, et seq.; U. S. Comp. Stat. 1901, p. 1388; Act May 14, 1880, 21 Stat. at L. 140, Chap. 89, Sec. 3; U. S. Comp. Stat. 1901, p. 1392; Rev. Stat., Sec. 2266; Act March 3, 1891, 26 Stat. at L. 1095, Chap. 561, Sec. 5, U. S. Comp. Stat. 1901, p. 1535; United States v. Waddell, 112 U. S. 76, 80, 26 L. Ed. 673, 674, 5 Sup. Ct. Rep. 35; Sturr v. Beck, 133 U. S. 541, 547, 33 L. Ed. 761, 764, 10 Sup. Ct. Rep. 350; Nelson v. Northern P. R. Co., 188 U. S. 108, 125, 47 L. Ed. 406, 413, 23 Sup. Ct. Rep. 302; Scott v. Lattig, 277 U. S. 229, 240, 57 L. Ed. 490, 495, 44 L. R. A. (N. S.) 107, 33 Sup. Ct. Rep. 242; Wadkins v. Producers' Oil Co. 227 U. S. 368, 373, 57 L. Ed. 551, 555, 33 Sup. St. Rep. 380. So it clearly appears from the allegations of the complaint, as admitted by the demurrer, that the land in question was open to homestead settlement when the plaintiff settled thereon; *that by his settlement and subsequent acts he acquired an inceptive homestead right which entitled him to the possession; and that the defendants, in forcing him to withdraw from the land, and in then withholding the* same from him, wrongfully invaded his possessory right." (Italics ours.)

When the lands sought to be acquired are unsurveyed, the only way in which a homestead settler can initiate his claim and acquire a preference right to the lands which he seeks is by *making a settlement and establishing his residence thereon,* and by such settle-

ment and residence he acquires a valuable and valid vested right under the homestead laws of the United States, which were enacted for the benefit of the actual settler.

Moss vs. Dowman, 176 U. S. 413 (44 L. Ed 526).
Shepley vs. Cowan, 91 U. S. 330 (23 L. Ed. 424).
Anderson vs. Carkins, 135 U. S. 483 (34 L. Ed. 272).
Bohall vs. Dilla, 114 U. S. 47 (29 L. Ed. 661).

In the case of Moss vs. Dowman, supra, Justice Brewer, in rendering the opinion of the court, says:

> "Pre-emption and homestead laws were enacted for the benefit of the actual settler, and to that end they should be construed and administered. The plaintiff herein contends that this tract of land was withdrawn for five years from settlement by mere successive entries in the land office, and could be kept thus withdrawn in the future indefinitely, while speculators wait such time as it becomes convenient to them to perfect title by settlement and occupation. The proposition thus made is so offensive to the spirit and purpose of the land laws of the United States that unless the statutes made such a result necessary from a true construction of their language it ought to be rejected. *Again and again has this court affirmed the proposition that the settler is the beneficiary of the pre-emption and homestead laws of the United States."* (Italic ours.)

In the case of United States vs. Waddell et al., 112 U. S. 76, (28 Law Ed. 673), also cited by Justice Van Devanter in the Gauthier case, supra, Justice Miller,

in delivering the opinion of the court, speaking upon the right of a settler upon public lands under the homestead law, says:

> "The right assailed, obstructed, and its exercise prevented or intended to be prevented as set out in this petition, is very clearly a right wholly dependent upon the Act of Congress concerning the settlement and sale of the public lands of the United States. No such right exists or can exist outside of an Act of Congress. *The Constitution of the United States, by Article IV, Section 3, in express terms vests in Congress the power to dispose of and make all needful rules and regulations respecting the territory or other property of the United States. One of its regulations, the one under consideration, authorizes a class of persons, of whom Lindsey is one, to settle upon its land and, on payment of any inconsiderable sum of money and the written declaration of intention to make it a homestead, he is authorized to reside there.* By building a house and making other imporvements on it and residing there for five years consecutively, *which, under the statute and under that alone, he has a right to do,* and paying the fees to the officer necessary to its issue, he acquires a patent or title in fee simple to the land. *But his title is dependent on continued residence of himself or family. By the original entry he acquires the inchoate but well-defined right to the land and its possession, which can only be perfected by continued residence, possession and cultivation for five years. His right to continue this residence for five years for that purpose is dependent upon the Act of Congress.* His right to the patent, after this is done, rests exclusively on the same foundation. The right here guaranteed is not the mere right of protection against personal violence. This, if the result of an ordinary quarrel or malice, would be cogni-

zable under the laws of the state and by its courts. But it is something different from that. *It is the right to remain on the land in order to perform the requirements of the Act of Congress and, according to its rules, perfect his incipient title. Whenever the acts complained of are of a character to prevent this or throw obstruction in the way of exercising this right, and for the purpose and with intent to prevent it or to injure or oppress a person because he has exercised it, then, because it is a right asserted under the law of the United States and granted by the law,* those acts come within the purview of the statute and of the constitutional power of Congress to make such statute." (Italic ours.)

Since the Act of February 25th, 1885, a valid settlement may be made upon public lands unlawfully enclosed, even though the settlement is effected by breaking and entering the enclosure.

Jones vs. Kirby, 13 L. D. 702.
Thompson vs. Holyroyd, 39 L. D. 362.
Stovall vs. Heenan, 12 L. D. 382.
Wheeler vs. Rodgers, 28 L. D. 250.
Norton vs. Westbrook, 9 L. D. 455.
Stoddard vs. Neigle, 7 L. D. 340.

In the case of Stovall vs. Heenan, supra, it is said:

"The preponderance of the evidence shows that Stovall fenced this land and built the cabin on it, not under any permit from the railroad company or with intention of buying it of the company, but solely to prevent it being settled upon and entered by other persons, until such time as he could take it. His acts were in violation of the law (Act of February 25, 1885, 23 Stats. 321), and in disregard of the President's proclamation

of August 7, 1885. In this proclamation the President refers to the act above cited, and says, *inter alia* 'I * * * do hereby order and direct that any and every unlawful inclosure of the public lands maintained by any person association or corporation, be immediately removed, and *I do hereby forbid any person, association or corporation from preventing* or *obstructing by means of such inclosure* * * * *any person entitled thereto from peaceably entering upon and establishing a settlement or residence on any part of such public land which is subject to entry and settlement under the laws of the United States, etc.*' Stovall was a wrongdoer and acquired no right by his fencing, breaking or cultivation. Heenan went upon the land *without any violence,—he made a settlement, built a house and established his residence within an enclosure* erected in violation of law. In the case of Horton v. Westbrook (9 L. D. 455), the case of Stoddard v. Neigle (7 L. D. 340), was followed, and it was said,—*'A settlement made without violence within the unlawful and unauthorized enclosure of another, is valid and will not be defeated by such unlawful occupancy.'*" (Italics ours.)

There is no contention on the part of respondent that plaintiff in error resorted to violence in making his settlement and establishing his residence upon the lands in question.

In the case of Jones vs. Kirby supra, it appears that the land in question was unsurveyed and had been enclosed by Kirby with a wire fence, the enclosure containing 150 to 200 acres. In making his settlement, Jones cut this wire fence, and it was contended by

Kirby that the settlement of Jones having been effected by breaking through his enclosure was in violation of law and that he gained no rights thereby.

In passing upon this question, First Assistant Secretary of the Interior Chandler says:

> "This Department has held that a settlement established by breaking an enclosure will not be upheld, but in all such cases the force was employed against one who was claiming the land by virtue of a right of entry or settlement, under some one of the land laws. *I know of no instance where a bona fide settler has been denied his settlement rights because he entered an unlawful enclosure for the purpose of asserting them, where such enclosure is prohibited by statute and its destruction allowed by circular of this Department.* See Stovall v. Heenan, 12 L. D. 382." (Italics ours.)

In the case of The Hastings and Dak. R. Co. vs. Whitney, 132 U. S. 366 (33 L. Ed. 363), Justice Lamar, in delivering the opinion of the court, after citing several decisions of the Land Department, says:

> "It is true that the decisions of the Land Department on matters of law are not binding upon this court, in any sense. But on questions similar to the one involved in this case they are entitled to great respect at the hands of any court. In United States v. Moore, 95 U. S. 760, 763 (24:588, 589), this court said: 'The construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration, and ought not to be overruled without congent reasons. * * * The officers concerned are usually able men, and masters of the

> subject. Not unfrequently they are the draftsmen of the laws they are afterwards called upon to interpret.' See also Brown v. United States, 113 U. S. 568, 571 (28:1079, 1080), and cases cited; United States v. Burlington & M. R. R. Co., 98 U. S. 334, 341 (25:198, 200); Kansas, Pac. R. Co. v. Atchison, T. & S. F. R. Co., 112 U. S. 414, 418 (28:794, 796)."

In the case of Bogan vs. Edinburgh, Am. Land Mtg. Co., 27 U. S. Appeals, 346, Judge Sanborn, in delivering the opinion for the Circuit Court of Appeals, after citing a long list of decisions from the Land Department upon the question at issue, said:

> "In the reports of these cases will be found opinions by Secretaries Delano, Teller, Vilas, Lamar and Noble in support of this view of the law, and no opinions of any of the Secretaries to the contrary have been called to our attention. The opinions of these eminent lawyers, one of whom subsequently became one of the Justices of the Supreme Court, are very pursuasive."

We call attention to the decisions of the Land Department for the purpose of showing that by the allegations of the affirmative defenses as set forth by plaintiff in error, he sets forth a right which would be recognized and upheld by said Department; which under the laws of Congress is charged with the duty of executing the laws relating to the public lands of the United States. And we call attention to the decisions of the United States Courts for the purpose of showing that in matters pertaining to the construction of public land laws the highest courts of the land recog-

nize and give weight to the interpretation of those laws as laid down by that department.

If the lands in question were unsurveyed public lands, as alleged by plaintiff in error in his affirmative defenses, and as he offered to prove, and were enclosed and occupied by respondent; not as a settler or claimant under any law of the United States, but as a trespasser upon the public domain in violation of the Act of February 25th, 1885, *supra,* as also alleged, then in that event plaintiff in error had the right to go thereon and make settlement and establish his residence under the laws of Congress, and such settlement and residence and all rights thereby acquired by plaintiff in error would be upheld by the Land Department.

The lands in question being unsurveyed, no entry or record could be made by or on behalf of plaintiff in error in the land office or land department by which he could acquire any right to the lands or any preference therein, and the only way that he could acquire any rights therein *under the federal homestead laws would be by going thereon in person and making settlement and establishing his residence upon the lands;* and in order to protect the rights he thus acquires, he must, under the law, continue that residence and make the lands his home and place of residence.

Gauthier vs. Morrison et al., supra.

There is no law under which a would-be settler

can bring an action in court, or in the Land Department, to oust an unlawful occupant of public lands and thereby gain a preference right to the lands upon which he desires to make settlement and establish his residence.

We are aware of the decisions of the Supreme Court of Washington in Gore vs. Altice, 33 Wash. 335, and kindred cases. But it will be observed that in none of the cases decided *was the question here presented before the court.* In the Gore case, as in other cases decided by said court along the same line, the only question involved was the interpretation of the forcible entry and forcible detainer statutes as they apply to private property; property which came under the legislative powers of the state; not property which by the provisions of the Constitution of the United States is under the exclusive jurisdiction and control of Congress, *and its right of possession and occupancy exclusively governed by the laws of Congress.* The question of the power of a state court to remove from the public domain, under the provisions of a state statute, a settler claiming his right thereto under the laws of Congress was not before said court in any of the forcible entry and forcible detainer cases heretofore decided, as it is in the instant case. We believe that in a forcible entry or forcible detainer case, whenever it is alleged by defendant that the land in question has never been surveyed, and it further appears that the defendant is claiming his right to the possession

thereof as a qualified homestead settler thereon, in good faith, under the homestead laws of the United States, that then and there such defendant has shown a good defense to plaintiff's cause of action and there the case must end. This must be so, for the reason that when the land is shown to be unsurveyed, it is shown that the title is in the United States and under the control of Congress, and when the defendant has shown that, he is asserting a right guaranteed to him by Congress, who alone has the power, under the Constitution, to grant any right to the occupation, or to the possession thereof. If Congress has the exclusive control of such lands, and that must be admitted surely a court cannot, by the enforcement of a state statute, deprive a person of a right granted and guaranteed to him by an act of Congress.

Under the laws of this state we have forcible entry (Sec. 810, R. & B. Ann. Codes), forcible detainer (Sec. 811) and unlawful detainer (Sec. 812), and thereunder provisions are made for separate and distinct causes of actions, which may be brought by a plaintiff according to the facts which he expects to prove. As no force, menace or violence is alleged by respondent to have been exercised by plaintiff in error, as provided for under Sub-division 1 of Section 811, this action is for forcible detainer under Sub-division 2 of said section, which provides as follows:

> "Every person is guilty of forcible detainer who either,—

> 2. Who in the night-time, or during the absence of the occupant of any real property *unlawfully* enters thereon, and who, after demand made for the surrender thereof, refuses for the period of three days to surrender the same to such former occupant. The occupant of real property within the meaning of this subdivision is one who, for five days next preceding such unlawful entry, was in the peaceable and undisturbed possession of such real property."

This is the provision of the statute under which the complaint is drawn, and under which, the entry must not only be made in the night-time or in the absence of the occupant for five days next preceding such entry, but the entry must be made *unlawfully*. And our contention is that an entry upon land cannot be held to be *unlawful* when the person so making the entry complained of *is doing that which an Act of Congress plainly says he may do, and by such entry he is asserting a right granted and guaranteed to him under a federal statute.* Consequently if the lands in question are unsurveyed public lands of the United States, as alleged in the affirmative defenses of plaintiff in error, and as he offered to prove, and he is qualified to make settlement and establish his residence thereon, and did so as a homestead settler under the homestead laws of the United States, as he also alleged and offered to prove, such defense and proof was competent, for the purpose of showing that instead of his entry upon the lands being *unlawfully* made it was *lawful*, under the provisions of a federal statute which gave

him the right to go thereon in the manner he did, if he so desired.

Again the proof required of a plaintiff in this kind of an action is fixed under the provisions of Section 825, R. & B. Ann. Codes, and must be given due consideration in determining this case. Said section provides as follows:

> "On the trial of any proceeding for any forcible entry or forcible detainer, the plaintiff shall only be required to show, in addition to a forcible entry complained of, that he was peaceably in the actual possession at the time of the forcible entry; *or in addition to a forcible detainer complained of, that he was entitled to the possession at the time of the forcible detainer.*"

Under these provisions the proof required of a plaintiff in a forcible detainer case, as well as in a forcible entry case, is clearly set forth, and we find that when the action is for *forcible detainer, as in the instant case,* the plaintiff is required to prove in addition to the forcible detainer that he *was entitled to the possession of the premises at the time of the forcible detainer.* Consequently in an action for forcible detainer under the statute of this state, the right of possession in the plaintiff is directly in issue. The action of forcible detainer is purely a statutory action, and before a plaintiff is entitled to recover the proof must clearly show that he comes fully within all the provisions of the statute under which he bases his right of recovery. Therefore, if it were shown that the lands

in question had never been surveyed, and that title thereto had never passed from the government by, through or under an Act of Congress, and that respondent was not claiming same under any law of the United States, but that plaintiff in error was claiming the possession thereof as a settler under the federal homestead laws, instead of it being shown that respondent was *"entitled to the possession"* of the lands in dispute, it would be shown that plaintiff in error was so entitled, and respondent has no right of action under the statute.

Under the statutes of New York it was provided that upon the trial the plaintiff shall only be required to prove in addition to the forcible entry or forcible detainer complained of, "that he was peaceably in the actual possession of the premises at the time of a forcible entry, or was in the constructive possession of the premises at the time of a forcible holding out." People ex rel etc. v. Van Nostrand, 9 Wend. 50, in which the statute as above is quoted. In the case of People ex rel. etc. vs. Reed, 11 Wend. 157, the court construed this provision to mean that the plaintiff must have some right to possession, and that a *mere intruder or trespasser* could not be restored to a possession which he held *unlawfully*. In passing upon this statute Savage C. J., says:

> ...."A mere *intruder or trespasser* could not institute proceedings under the statute and be restored to the possession which he held *unlawfully,* but every person *lawfully* in possession, and forcibly

excluded from such possession is entitled to the benefit of this statute." (Italics ours.)

In the case at bar it is shown by the pleadings, and plaintiff in error offered to prove, that respondent's claim of possession was unlawful under a federal statute. It has never been the policy of the courts to either aid, assist or uphold a person in the doing of an unlawful act. Courts of law were not created for that purpose; but rather to aid and assist those who are asserting a right under the law, and to punish those who are violating its provisions. If plaintiff in error had been allowed to prove, and had proved, the allegations of his affirmative defenses, he would have shown that not only in doing the acts complained of he was performing a lawful act in a lawful manner; but that respondent is asking the court to aid and assist him in the performance of an unlawful act, and to uphold as lawful that which is declared, by a federal statute, to be unlawful. And, not only that, but also to take from plaintiff in error all rights by him acquired in the doing of that which is lawful, and reinstate respondent in his unlawful possession; and further require plaintiff in error to pay to respondent treble damages for interfering with his unlawful possession; and to be allowed to prove such damages regardless of whether his possession is *lawful or unlawful.* Can this be the law? Is this the justice which courts are supposed to administer? Are courts only required to view one side of a case; point to the law relied upon by the plaintiff; enforce its provisions to the letter, and

disregard any defense that the defendant may have unless it be made under the particular law or statute invoked by plaintiff? Or is law and justice in a forcible detainer case administered in a different manner than in other kind of cases, and the fundamental principles, which ordinarily govern are not to be applied in this kind of a case? Is not the law as laid down by Chief Justice Savage in the New York case cited, in accordance with the true principles that govern in all courts, in all cases? And is it not the law in this kind of a case, as in all others, that courts will not lend their aid to, or uphold any litigant in, the doing of an unawful act, and especially when such unlawful act works to the detriment of one who is doing that which is lawful?

In the case of Hebeisen vs. Hatchell, 69 Pac. 888, it appears that plaintiff brought an action of unlawful detainer against defendant and was successful before the trial court. Upon appeal to the Supreme Court it was found that the action was brought to recover possession of lands, the title to which, at the time of the commencement of the action, was in the United States and a contest pending before the Land Department between the parties, although the contest was finally decided in favor of plaintiff before the trial of the case. Upon these facts the judgment of the trial court was reversed *and the trial court directed to dismiss the action for want of jurisdiction.* In the case of Commager vs. Dicks, 28 Pac. 864, an action was com-

menced in forcible entry and detainer and judgment for plaintiff was rendered in the trial court. Upon appeal this judgment was reserved, and in rendering the opinion the court says:

> "It appearing that the defendant's entry upon said land was lawful and peaceable, and with the bona fide intention of making a homestead thereon, and it further appearing that at the time this action was commenced the claims of the parties thereto to said premises were being waged in the land department, *the court should not have entertained jurisdiction, but should have dismissed said cause at the cost of the plaintiff*. The judgment of the district court is reversed, with costs, and the cause is remanded, *with direction to dismiss said action at the cost of the plaintiff.*"

In the case of Streeter vs. Rolph, 14 N. W. 166, it was held that, as it appeared that the title to the land in question was still in the government, an action of forcible entry would not lie.

In the instant case, plaintiff in error is not attempting to put the title in issue. All he is claiming, is that the lands in question have never been disposed of by the United States, that they are agricultural in character, and that he is in the possession thereof, under an Act of Congress, which grants to him the right to enter thereon and to the possession thereof, and that no court can under a state statute deprive him of that right. And we again assert that when it is shown that the lands have never been surveyed and title passed from the government by, through or under an Act of

Congress and that plaintiff in error, having the necessary qualification, is a settler thereon under the federal homestead laws, *the action should be dismissed as an action in forcible detainer will not lie.*

The inconsistency of the decision complained of is apparent from the fact that while the court held that plaintiff in error could not prove that the lands in question were unsurveyed public lands of the United States, subject to his settlement and residence under the Federal Homestead Laws, and that respondent was using and occupying same as a trespasser upon public lands, at the same time, respondent was allowed to prove that he was claiming such lands under color of title made or acquired in good faith.

If the decision of the State Supreme Court in the instant case is sustained, as a result trespassers upon the public domain can, by enclosure thereof, prevent any good faith settler from making a settlement and maintaing a residence thereon and acquiring title thereto from the government, under the settlement laws of the United States, and thus an unlawful act will be sustained by courts of justice, and the doing of a lawful act prevented.

In this case not only did the court strike the affirmative defenses set forth by plaintiff in error in his answer showing that in going upon the lands in question he was exercising a right granted to him by an act of Congress, and at the trial of the case refused to allow him to introduce any evidence showing that the lands

in question were unsurveyed lands that had never been alienated by the government of the United States, but in addition thereto the trial court instructed the jury that it is not material whether the lands in question are public lands, open to homestead settlement or not.

As we view the law, the decision of the State Supreme Court in this case, is in direct conflict with the provisions of Section 3, Article IV of the Constitution of United States, and the acts of Congress relating thereto, and denies to plaintiff in error the rights and privileges granted to him thereunder.

Respectfully submitted,

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